Jurisdictional Statement

81-2062

No. .....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NEW YORK SHIPPING ASSOCIATION, INC., NYSA-ILA GAI FUND, and NYSA-ILA VACATION AND HOLIDAY FUND,

Appellants,

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

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Questions Presented

This case presents for adjudication important questions of federal constitutional law, never previously decided by this Court, relating to the levy of state assessments upon federally regulated employee benefits. These questions are:

(1) Whether the imposition, upon employee benefits paid by industry trust funds to offset the effects of technological job displacement, of a state assessment expressly limited by its statutory terms to "gross payroll payments [paid] by employer[s] . . . for work or labor performed" is a taking of property without legislative authorization in violation of the due process provisions of the Constitution of the United States?

(2) Whether a state tax or assessment upon employee benefit funds, in conflict with the firm congressional policy that these funds be governed exclusively by federal law and be entitled to tax exempt status, is void under the Supremacy Clause of the Constitution of the United States? [1]

Parties

In addition to appellants, the parties before the Court of Appeals of New York included several members of Appellant New York Shipping Association, Inc. ("NYSA"),[2]

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[1] In *Memphis Bank & Trust Co.* v. *Garner*, 50 U.S.L.W. 3858 (U.S. Apr. 26, 1982) (No. 81-1613), this Court, by noting probable jurisdiction, accepted for plenary review issues involving a similar conflict between federal policy and a state revenue measure. *See* note 21 *infra*.

[2] These NYSA members were The American Sugar Refining Company of New York; Atlantic Container Line (G.I.E.); Daniels & Kennedy, Inc.; Global Terminal & Container Services, Inc.; Ham-

(footnote continued on succeeding page)

who were plaintiffs-respondents below, the individual trustees of Petitioners NYSA-ILA GAI Fund and NYSA-ILA Vacation and Holiday Fund,[2] who were counterclaim-defendants-respondents below, and the Attorneys General of New York and New Jersey, who were *amici curiae* below.

In accordance with Rule 28.1 of the Rules of this Court, it should be noted that corporate appellant NYSA has one subsidiary, Atlantic Cargo Inspection Corporation. None of the other appellants has any parent corporation or subsidiary.

(continuation of footnote from preceding page)

ilton Marine Contracting Co., Inc.; Hamilton Terminal Corporation; Hellenic Lines Limited; Frank J. Holleran, Inc.; Howland Hook Marine Terminal Operating Co.; International Terminal Operating Co., Inc.; LeDoux Crane Corp.; Lee & Palmer, Inc.; Lipsett Steel Products, Inc.; John W. McGrath Corporation; Maersk Container Service Co., Inc.; Maher Terminal Inc.; R. Martorella & Co., Inc.; M.I. Special Services Corp.; M.I. Stevedores, Inc.; Moore McCormack Lines, Inc.; Northeast Marine Terminal Co., Inc.; Northeast Stevedoring Co., Inc.; Pittston Stevedoring Corp.; Prolerized Schiabo-Neu Company; Quin Marine Services, Inc.; Sea-Land Service, Inc.; Temco Service Industries, Inc.; United Terminals Inc.; Universal Maritime Service Corp.; and, Union Minerals & Alloys Corp. Each of these members has a direct and substantial interest in this appeal. Their interests are being represented by NYSA.

[2] The individual trustees of the Funds were James J. Dickman, Thomas W. Gleason, Anthony Anastasio, John Bowers, Robert F. Chiarello, Vincent Colucci, James G. Costello, C.H.C. Everhard, John J. Farrell, Jr., Carol Gardner, Dagfinn Gunnarshaug, William P. Lynch, Michael E. Maher, Joseph F. McGoldrick, Francis X. McQuade, William Murphy, Anthony Scotto, Donald J. Schmidt and Walter L. Sullivan.

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Appellants,

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

This is an appeal from the final judgment entered in this case on February 11, 1982 by the Court of Appeals of the State of New York.

Opinions Below

The opinion of the Court of Appeals is reported at 55 N.Y.2d 11, 447 N.Y.S.2d 685, 432 N.E.2d 578 (1982). A copy is reproduced as Appendix A to this jurisdictional statement (App. A at 1a-24a).[4] The judgment of the Appellate

[4] References are to the pages of the appendices.

Division of the Supreme Court of New York (App. C at 29a-31a) appears at 79 A.D.2d 892, 435 N.Y.S.2d 868 (1st Dep't 1980). The opinion of the court of first instance, the Supreme Court of New York, is unreported. It is reproduced as Appendix D to this statement (App. D at 32a-34a).

Jurisdiction

The judgment of the Court of Appeals of New York (App. A at 25a) was entered on February 11, 1982. A notice of appeal to this Court (App. G at 48a-51a) was duly filed in the Court of Appeals of New York on April 19, 1982.[5] This appeal is being docketed within 90 days of the entry of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) (1976).[6]

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[5] On April 22, 1982, a copy of the notice of appeal was also filed in the Supreme Court of the State of New York for the County of New York, which now has possession of the record in this case (App. G at 50a).

[6] The taxing statute challenged in this case—albeit embodied in a congressionally approved bistate compact—is a state statute for purposes of a § 1257(2) appeal. Every case in which this Court had previously reviewed the very compact at issue in this case reached this Court by the appeal route. *DeVeau* v. *Braisted*, 363 U.S. 144, 146 (1960) ("[s]ince a statute of a State has been upheld by the highest court of the State against a federal constitutional attack, the case is properly here on appeal"); *cf.*, *Linehan* v. *Waterfront Comm'n of N.Y. Harbor*, 347 U.S. 439 (1954). The recent decision in *Cuyler* v. *Adams*, 449 U.S. 433 (1981), does not alter this course. *Cuyler* does not remove interstate compacts from this Court's § 1257(2) appeal jurisdiction. It simply preserves its alternate jurisdiction to entertain by certiorari interstate compacts that are not under constitutional attack.

Relevant Constitutional and Statutory Provisions

(1) U.S. CONST. *art. VI, § 10, cl. 2:*

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

(2) U.S. CONST. *amend. XIV, § 1:*

> Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(3) *Waterfront Commission Act of New York and New Jersey ("WCA"), N.Y. Laws of 1953, c, 882, and N.J. Laws of 1953, c. 203, pt. I, art. XIII, § 1, ¶ 3 (codified in N.Y. Unconsol. Laws § 9858 (McKinney 1974)):*[7]

> After taking into account such funds as may be available to it from reserves, federal grants or otherwise, the balance of the commission's budgeted expenses shall be assessed upon employers of persons registered or licensed under this compact. Each such employer shall pay to the commission an assessment computed upon the gross payroll payments made by such employer to long-

[7] The WCA is a bistate compact which was approved by an Act of the Congress of the United States. Pub. L. No. 83-252, 67 Stat. 541 (1953). For ease of reference, WCA provisions will be cited in this statement to the sections of the N.Y. Unconsol. Laws.

shoremen, pier superintendents, hiring agents and port watchmen for work or labor performed within the port of New York district, at a rate, not in excess of two percent, computed by the commission in the following manner: the commission shall annually estimate the gross payroll payments to be made by employers subject to assessment and shall compute a rate thereon which will yield revenues sufficient to finance the commission's budget for each year. Such budget may include a reasonable amount for a reserve but such amount shall not exceed ten per cent of the total of all other items of expenditure contained therein. Such reserve shall be used for the stabilization of annual assessments, the payment of operating deficits and for the repayment of advances made by the two states.

Raising the Constitutional Challenge

At the very outset of this litigation, the complaint asserted the claim that, since the contested taxing statute did not authorize a levy upon employee benefits, the challenged assessment constituted an unconstitutional taking "of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States." In their cross-motions for summary judgment, appellants voiced their alternative claim that the state assessment was preempted by paramount federal law under the Supremacy Clause.

The court of first instance granted a declaratory judgment that the challenged assessment was unlawful since it was without statutory authorization. It never reached the preemption question. Five Appellate Division justices affirmed. The New York Court of Appeals reversed. It expressly addressed the constitutional challenges (App. A at 3a, 18a-19a), but sustained the validity of the statute.

Statement of the Case

This case involves the attempt by Appellee Waterfront Commission of New York Harbor, the WCA's enforcement agency (App. D at 32a), to extend the grasp of its statutory assessment to reach employee benefits collectively bargained in response to technological job displacement (App. D at 32a). The devastating impact of containerization upon longshoremen and the bitter labor relations conflict spanning a quarter century that it engendered are well known to this Court. *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490 (1980).

In 1964, under the auspices of the United States Department of Labor, a presidential panel recommended supplemental unemployment benefits to longshoremen involuntarily displaced or separated from employment because of automation (App. F at 43a). Management and labor in the Port of New York agreed to adopt the panel's recommendations.[8] They collectively bargained an employee benefits program designed to ameliorate the effects of the new technology (App. A at 21a). This program provided an unparalleled package of fringe benefits, including pension, welfare, medical, clinical, vacations and holidays ("V&H"), and supplemental unemployment benefits, known as Guaranteed Annual Income ("GAI").

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[8] NYSA is the multi-employer bargaining association for the industry. Its membership consists of steamship carriers and stevedoring companies (App. A at 5a). Some NYSA members do not directly employ longshore workers. These companies are principally steamship carriers engaged in the ocean transport of freight. Steamship carriers contract with independent stevedoring companies which directly employ longshoremen to service the carriers' vessels. The thirty individual plaintiffs in this case are the members of NYSA who directly employ longshoremen. *See* note 2 *supra*. Four of these plaintiffs are the only steamship carriers of the more than one hundred serving the port that directly employ longshoremen to stevedore their vessels (App. A at 3a).

Eligibility for these benefits is structured to include the displaced workers whom the benefits are designed to compensate (App. F at 42a, 47a). The key eligibility factor is necessarily attachment to the industry—not work or labor performed (App. A at 11a). Indeed, GAI by its very nature is a benefit provided to displaced longshoremen who perform no work (App. A at 9a).[9] Similarly, eligibility for V&H benefits depends upon prior experience in the industry—not actual work for any individual employer (App. A at 8a).

Recognition that it was automation which gave rise to the fringe benefit program prompted the adoption of an assessment system which placed the funding obligation not upon the longshoremen's direct employers but upon steamship carriers serving the Port in proportion to their use of the offending technology (App. A at 10a, 21a). This assessment, which has been approved by the Federal Maritime Commission in accordance with this Court's teachings in *Volkswagenwerk AG* v. *FMC*, 390 U.S. 261 (1968), is levied upon cargo volumes moving through the port, not upon manhours of work performed (App. A at 21a).

A network of industry trust funds, established under § 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186 (Supp. III 1979), and governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.* (1976), was created to carry out both the collection and payment phases of the fringe benefit program (App. A at 8a; App. D at 33a). These trust funds receive the tonnage assessments from the steamship car-

[9] The Internal Revenue Service has ruled that GAI payments "are not wages." (App. A at 10a; App. F at 47a). The state unemployment authorities of both New York and New Jersey agree. They have ruled that GAI benefits do not constitute wages subject to state unemployment taxes and, therefore, do not disqualify GAI recipients from unemployment benefits (App. A at 10a).

riers and directly dispense fringe benefits to the longshoremen and their dependents.[10]

This case grew out of the Waterfront Commission's attempt to assess GAI and V&H benefits. The narrow, precise and unambiguous language of the Commission's payroll taxing statute, which was enacted before the advent of containerization, authorizes an assessment on "gross payroll payments" paid to longshoremen by their "employer[s]" "for work or labor performed." *See* pp. 3-4 *supra*. GAI and V&H benefits do not meet these statutory criteria. They are funded by tonnage assessments and paid by independent trust funds to longshoremen not for work performed but for industry attachment.

From the inception of the tonnage assessment and the formation of the employee trust funds, appellants continually protested the Commission's attempt to assess GAI and V&H benefits (App. A at 6a). However, the Commission's assessment was paid under protest until January 1, 1978 when it reached a level harmful to the competitive position of the Port of New York. Payments were then discontinued and this litigation ensued for a judicial declaration of the invalidity of the assessment.

The Decisions Below

The court of first instance had no difficulty interpreting the Commission's taxing statute as written. Based upon the manifest facts that "GAI and V&H benefits are not paid by employers of longshoremen [n]or are they paid for work or labor performed," the court readily concluded that "GAI and V&H benefits are not payments within the wording of the taxing statute under construction." (App. D at

[10] Two of these employee trust funds are Appellants NYSA-ILA GAI Fund and NYSA-ILA Vacation and Holiday Fund.

33a). The five justices on the Appellate Division panel affirmed unanimously without opinion (App. C at 30a-31a).

The New York Court of Appeals reversed. Under the guise of statutory construction, the highest court of New York engaged in blatant judicial legislation. It simply rewrote WCA § 9858 to accommodate the Commission's financial appetite. "[G]ross payroll payments . . . for work or labor performed" were transmuted by the Court of Appeals into "the labor costs of the industry, however incurred." (App. A at 16a). "[E]mployers of persons registered or licensed under this compact" were magically converted into "payor[s] of the benefits." (App. A at 22a).[11]

The Court of Appeals admitted that the employee benefits at issue were "paid for *not* performing labor." (App. A at 11a; emphasis in original). Nevertheless, it brazenly permitted their assessment under a statute which expressly reaches only payments "for work or labor performed." The statute written by the Legislatures of New York and New Jersey and approved by Congress was facilely discarded in favor of a new version enacted by the Court of Appeals.[12] This perversion of the court's role amounted to an aiding and abetting of the Commission's unconstitutional taking of property.

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[11] The extent to which the Court of Appeals engaged in legislation is underscored by its reliance on *Bunnell* v. *New England Teamsters Pension Fund*, 655 F.2d 451 (1st Cir. 1981), *aff'g* 486 F. Supp. 714 (D. Mass. 1980), *cert. denied*, 102 S.Ct. 1253 (1982). The statute at issue in *Bunnell* expressly defined the person making the payment as the "employer" responsible for withholding taxes. No comparable statutory definition exists in WCA § 9858 which would permit a departure from the ordinary meaning of "employer." The Court of Appeals conveniently enacted this missing element.

[12] The New York court brushed aside appellants' preemption challenge by dubbing its legislative handiwork "a Federal law." (App. A at 19a).

The Questions Are Substantial

The unique and progressive fringe benefit program fashioned in the New York longshore industry is the social by-product of a technological revolution. Technology, however, is not limited to the waterfront. It is now burgeoning throughout every segment of the national economy. Other industries will now be called upon to develop, at the collective bargaining table, specialized responses of their own. Principles that emerge in this case, therefore, will define the role that states may play in regulating and taxing the innovative programs that will accompany the accelerating technology.

Congress has seen the need for a national response. It has expressly encouraged the private sector to resolve through collective bargaining the problems spawned by technology. *NLRB* v. *International Longshoremen's Association,* 447 U.S. 490, 511 (1980); *see* LMRA § 101, 29 U.S.C. § 151(1976); *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission,* 427 U.S. 132, 153 (1976); *NLRB* v. *Burns International Security Services, Inc.,* 406 U.S. 272, 288 (1972); *NLRB* v. *Insurance Agents International Union,* 361 U.S. 477, 489-90 (1960). It has shown particular solicitude for employee fringe benefit programs as the favored instrument of worker protection. A well-defined system of exemptions has been sculptured in the Internal Revenue Code to shield fringe benefit programs from taxation. *See, e.g.,* App. F at 47a and 26 U.S.C. §§ 401, 501(c)(9) and 501(c)(17)(1976). These benefits have also been accorded favored priority status under the Bankruptcy Code. *See* 11 U.S.C. § 507(a)(Supp. IV 1980). Recently, Congress adopted ERISA, a comprehensive regime for the regulation of employee benefits. 29 U.S.C. § 1001, *et seq.*

(1976). In this pervasive statute, Congress made clear its intent to confine employee benefits exclusively to the federal domain "superced[ing] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a)(1976); *see Alessi* v. *Raybestos-Manhattan Inc.*, 451 U.S. 504 (1981).

The New York Court of Appeals subverted this congressional design. It stripped away the protections that Congress had carefully fashioned and laid bare employee benefits to disparate and disruptive state treatment. This result was achieved in the name of "Federal law." (App. A at 19a).

In the New York court's view, every interstate compact is automatically a federal statute for all purposes and thus immune from a preemption challenge.[13] The jurisprudential nature of an interstate compact raises a serious question unanswered in previous decisions of this Court.[14] Although the federal coloration of interstate com-

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[13] The Court of Appeals sidestepped the antagonism between its interpretation of WCA § 9858 and the federal scheme by noting that appellants had characterized the challenged statute as a state enactment and thus limited their argument to preemption (App. A at 19a). However, the court conveniently overlooked the fact that the antagonism appellants had demonstrated would be equally sufficient to defeat the operation of a federal statute under the doctrine of implied repeal. This is especially true in this case, where the challenged application of the statute occurred long after Congress' approval and followed the formulation of the comprehensive federal scheme with which it conflicts.

[14] The status of the WCA as a state statute has never before been questioned. The many decisions spanning the thirty year life of the WCA have consistently treated it as a state statute. This Court, *DeVeau* v. *Braisted*, 363 U.S. 144 (1960); the Second Circuit, *Int'l Longshoremen's Ass'n* v. *Waterfront Comm'n of N.Y. Harbor*, 642 F.2d 666 (2d Cir. 1981), *rev'g on other grounds* 495 F. Supp. 1101 (S.D.N.Y. 1980), *cert. denied*, 102 S.Ct. 509 (1981); *Bell* v. *Waterfront Comm'n of N.Y. Harbor*, 279 F.2d 853 (2d Cir. 1960); the highest court of New Jersey, *Int'l Longshoremen's Ass'n* v. *Waterfront Comm'n of N.Y. Harbor*, 85 N.J. 606, 428 A.2d 1283 (1981);

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pacts has been given some recognition, they have never been expressly accorded the status of federal statutes. *See, e.g., Lake Country Estates Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959); *Delaware River Joint Toll Bridge Commission* v. *Colburn*, 310 U.S. 419 (1940). The New York court's willingness to conscript interstate compacts into the ranks of federal statutes was inspired by this Court's decision in *Cuyler* v. *Adams*, 449 U.S. 433 (1981). Appellants have found nothing in *Cuyler* which would sanction this expansive reading. *Cuyler* did not transform all interstate compacts into federal statutes. It simply recognized that congressional approval imbued these state enactments with a federal dimension that permits federal courts to interpret them, *id.* at 438-42, and this Court to exercise its certiorari jurisdiction. *See* note 6 *supra*.[15] In any event,

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and a host of lower courts, *New York Shipping Ass'n* v. *Waterfront Comm'n of N.Y. Harbor*, No. 78-0995 (D.N.J.), *aff'd mem.*, 582 F.2d 1275 (3d Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979); *Rivoli Trucking Corp.* v. *American Export Lines, Inc.*, 167 F. Supp. 937 (E.D.N.Y. 1958); *Linehan* v. *Waterfront Comm'n of N.Y. Harbor*, 116 F. Supp. 401 (S.D.N.Y. 1953), *aff'd*, 347 U.S. 439 (1954); *cf. Ciccone* v. *Waterfront Comm'n of N.Y. Harbor*, 438 F. Supp. 55 (S.D.N.Y. 1977), have all reached this same conclusion. The New York Court of Appeals itself adopted this same view in *DeVeau* v. *Braisted*, 5 N.Y.2d 236, 183 N.Y.S.2d 793, 157 N.E.2d 165 (1959), *aff'd*, 363 U.S. 144 (1960), when it sustained the WCA against a preemption challenge, *id.* at 241—a meaningless exercise if the statute were not a state enactment. In this case, however, it eschewed its earlier characterization in favor of dictum in a later, non-preemption case that the construction of an interstate compact is a matter of federal law. *Bell* v. *Waterfront Comm'n of N.Y. Harbor*, 20 N.Y.2d 54, 281 N.Y.S.2d 753, 228 N.E.2d 758 (1967). Even this view was espoused by less than a majority of the *Bell* court.

[15] The New York court's confusion adds to the importance of this case. Adjudication of the merits will enable this Court to clarify

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the decision of the New York Court of Appeals warrants review by this Court no matter which label is affixed to the WCA.

Due Process Question

The due process question in this case persists whether the WCA be a state or a federal statute. The unconstitutional deprivation arises from the application of the WCA, not from its enactment. Its unlawful application is the product of state action. The Commission is a state agency. *Petty, supra*, 359 U.S. at 279; *Ciccone* v. *Waterfront Commission of New York Harbor*, 438 F. Supp. 55, 58 (S.D.N.Y. 1977). Its commissioners and executive officers are selected by the Governors of New York and New Jersey. *See* WCA § 9808. Its annual budget is passed upon by the two states. *See* WCA § 9857. More importantly, any budgetary deficit encountered by the Commission must be made up by appropriations from the states' treasuries. *See* WCA § 9859.[16] Hence, any misappropriation of appellants' property through an unwarranted extension of the Commission's taxing power violates the due process clause of the Fourteenth Amendment.[17]

(continuation of footnote from preceding page)

Cuyler and its other decisions on the status of interstate compacts. The accelerating adoption of compacts underscores the national importance of this question. Of the 176 compacts created since the inception of the Union, 140 have come into being within the last sixty years. *Compare* 23 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 601 note (1980) *with* W. BARTON, INTERSTATE COMPACTS IN THE POLITICAL PROCESS 3 (1967).

[16] The Commission unabashedly entreated the Court of Appeals to protect the Commission from the alleged "bankruptcy" that would ensue if it did not prevail. The effect of the decision in this case upon the state treasuries was the basis for the *amici* applications of the Attorneys General of New York and New Jersey.

[17] If the Commission were a federal agency, the misappropriation would still be unconstitutional—albeit under the Fifth Amendment.

The denial of due process in this case is self-evident. The interpretation given to the statute by the administrative agency with the connivance of the Court of Appeals is so at odds with the plain language of the legislation that it amounts to an unconstitutional taking of property. Behind this patent—but easily correctible[18]—wrong lurk questions of profound importance, never before treated by this Court, relating to the extent to which the states may invade the federal preserve of employee benefits.

Supremacy Question

The states' ability to look to employee benefit funds as a source of revenue presents an important question that is bound to recur. The number and size of employee benefit funds have undergone dramatic expansion in recent years. *See* 29 U.S.C. § 1001(a) (1976). Advancing technology augers the continuation of this growth at an ever accelerating pace. Congress has deliberately enhanced this phenomenon by its decision to afford preferential tax treatment and other protections. Hence, employee benefit funds have become an inviting target for taxing authorities.[19]

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[18] The gross statutory misconstruction by the New York Court of Appeals warrants summary reversal.

[19] This question transcends the tax mechanism chosen by the states to reach these funds. Whether the WCA be a state or federal statute is irrelevant. The pertinent consideration is its use to tax employee benefits. Indeed, if the Court of Appeals is correct in its characterization of this interstate compact as a federal enactment, then review by this Court of the New York court's interpretation of the reach of the WCA's taxing provision is all the more essential. Since this interpretation directly conflicts with the express congressional design to exempt employee benefits from taxation, this Court should exercise its power as the final arbiter of the meaning of interstate compacts, *Petty, supra*, 359 U.S. at 278, to bring the WCA in line with the will of Congress.

In this case the temptation was irresistible. The Court of Appeals of New York sanctioned a veritable feeding frenzy by the Commission upon employee benefits in the Port of New York. Not only were the two benefits at issue in this case dished out, but the court heaped upon the Commission's platter all "the labor costs of the industry, however incurred." (App. A at 16a). The awarding of a scholarship, the payment of life insurance premiums, indeed the dispensing of cough syrup at a longshore clinic, have now become taxable events. More importantly, the Court of Appeals version of WCA § 9858 extends the Commission's taxing power to embrace pensions, the backbone of worker security. Even the Commission has never suggested that pensions fall within its taxing authority.

The Court of Appeals of New York excused its expansive reading of WCA § 9858 by the expedient device of labeling the imposition a licensing assessment or fee (App. A at 11a, 15a-16a).[20] The court, however, failed to explain how this "fee" could be levied upon employee benefit trust funds not required to be licensed under the WCA. It simply changed the statutory language, which explicitly limited the levy to employers, so as to permit the imposition upon the funds as "payors of the benefits." (App. A at 22a). In so doing, it disregarded the teachings of both Congress and this Court that employee benefit trust funds are entirely separate and distinct from the contributing employers. ERISA §§ 403(a), 403(c)(1) and 404(a), 29

[20] The Commission's annual levy of more than $6 million derived from the application of a percentage rate is hardly the type of small, flat charge characteristic of a regulatory or licensing fee. In any event, the imposition of a fee, like a tax or other assessment, is an exercise of governmental taxing power subject to the canon of strict construction. *Neuberger* v. *Commissioner*, 311 U.S. 83, 88-89 (1940); *United States* v. *Merriam*, 263 U.S. 179, 187-88 (1923); *Gould* v. *Gould*, 245 U.S. 151, 153 (1917).

U.S.C. §§ 1103(a), 1103(c)(1) and 1104(a) (1976); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981).

The approach of the New York Court of Appeals, if allowed to stand, would vitiate the protections Congress has so carefully constructed around employee benefit funds. Tax exemptions were created by Congress as incentives to encourage the establishment of employee benefit programs. Dilution of these exemptions is at odds with the congressional purpose. It thwarts the incentives and undermines the funds' financial soundness which Congress painstakingly sought to promote. *See* 29 U.S.C. § 1001(a) (1976). State interference of this magnitude which "produce[s] a result inconsistent with the objective of the federal statute" must yield. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1917).[21] This state enroachment upon federal employee benefit policy raises substantial questions warranting consideration by this Court.

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[21] Another state forage into an area placed off limits by Congress is presently under review. *Memphis Bank & Trust Co.* v. *Garner*, 624 S.W.2d 551 (Tenn. 1981), *prob. juris. noted*, 50 U.S.L.W. 3858 (U.S. Apr. 26, 1982) (No. 81-1613) In that case, Tennessee sought to impose a bank tax measured in part by bank earnings from United States obligations. The attempt by the Supreme Court of Tennessee, *id.* at 554, to obscure the antagonism with the federal scheme by interpreting and characterizing the state statute as a franchise tax did not deter this Court from noting probable jurisdiction. Similarly, the New York court's manipulations of the WCA in this case, which do not suppress the head-on collision with overriding federal policy, should not inhibit this Court's review.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Dated: New York, New York
May 5, 1982

Respectfully submitted,

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Appendix

APPENDIX A

Judgment and Opinion of the Court of Appeals of the State of New York

STATE OF NEW YORK
COURT OF APPEALS

No. 624

THE AMERICAN SUGAR REFINING COMPANY OF NEW YORK, et al.,

Respondents,

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Appellant,

NYSA-ILA VACATION AND HOLIDAY FUND, et al.,

Counterclaim-Respondents.

Argued November 16, 1981; decided February 11, 1982

Irving Malchman, Jerome J. Klied, Gerald P. Lally and David B. Greenfield, for appellant.

Robert Abrams, Attorney-General (Stanley Fishman and Shirley Adelson Siegel of counsel), for the State of New York, *amicus curiae.*

James R. Zazzali, Attorney General (William Harla of counsel), for the State of New Jersey, *amicus curiae.*

Appendix A—Judgment and Opinion of the Court of Appeals of the State of New York

Donato Caruso and C. P. Lambos, for New York Shipping Association, Inc., respondent.

Thomas W. Gleason and Ernest L. Mathews, Jr., for NYSA-ILA Vacation and Holiday Fund and others, respondents.

MEYER, J.

The Waterfront Commission Compact[1] contemplates the payment of commission expenses, to the extent not covered by Federal grant, by an assessment upon the industry computed upon gross payroll payments at a rate not in excess of 2%,[2] any amount over the total thus available to be financed by appropriations made by the New York and New Jersey Legislatures in proportion to the gross annual payments made to longshoremen for work in each State within the Port of New York district.[3] Payments made through trust funds established pursuant to Federal law covering vacation and holiday benefits and guaranteed annual income benefits are part of the gross payroll payments subject to assessment and the trust funds making such payments are "employers" within the meaning of the Compact's assessment provision, as also are plaintiffs. The

[1] The commission was established in 1953 by interstate Compact (L 1953, ch 882; [NJ]L 1953, ch 202) which was approved by the Congress (67 US Stat 541). The Compact constitutes part I of title 29 of McKinney's Unconsolidated Laws (Book 65). Parts II and III of that title enact implementing provisions not part of the Compact approved by Congress. The three parts together are known as the Waterfront Commission Act. For facility of reference, provisions of the Compact (part I) and the implementing statutes (parts II and III) will be cited by Unconsolidated Law section numbers.

[2] (§§9858, 9904.)

[3] (§9859.)

order of the Appellate Division should, therefore, be reversed, with costs, and the matter remitted for the entry of judgment as hereafter indicated.

I

This declaratory judgment action was begun by four steamship companies and 26 other companies, all of whom operate in the Port of New York area, against the Waterfront Commission of New York Harbor.[4] The four carriers do their own stevedoring and thus hire longshoremen directly. The other 26 companies provide stevedoring and related services for other carriers and in doing so directly employ longshoremen, who are represented in collective bargaining by the International Longshoremen's Association (ILA). All 30 plaintiffs are members of the New York Shipping Association (NYSA) although they do not sue in that capacity. In two causes of action, the complaint seeks judgment declaring (1) that assessment by the commission on the vacation and holiday benefits and guaranteed annual income (GAI) benefits hereafter described is unauthorized and unconstitutional and (2) that the formula by which the commission proposes to allocate to the respective plaintiffs a portion of the obligation for benefit payments previously made by the NYSA-ILA Vacation and Holiday Fund and the NYSA-ILA GAI Fund (Funds) hereafter referred to is arbitrary and invalid. The commission not only answered the complaint but also in a counterclaim against plaintiffs, the Funds and their trus-

[4] The name was changed by chapter 951 of the Laws of 1970 to the Waterfront and Airport Commission of New York and New Jersey (§10060). The change has never become effective, Congressional consent to the additional Compact provisions never having been granted.

tees and NYSA asked judgment that the benefit payments are "gross payroll payments" within the meaning of section 9858 and that the plaintiffs are employers within the meaning of that section, or alternatively that the Funds are each, or that NYSA is, an employer within the meaning of the section. The reply of plaintiffs and of NYSA as a counterclaim-defendant in turn counterclaimed against the Commission for the same relief asked by plaintiffs in their first cause of action as well as for the refund to NYSA of $3,334,528.14 in assessments alleged to have been paid by NYSA to the commission on such benefits during the period January 1, 1973 through February 24, 1978, which it was alleged was paid by it in error and was illegally collected by the commission. The reply of the other counterclaim-defendants admitted the formal allegations of the commission's counterclaim but denied the commission's right to assess on the basis of such benefit payments as well as any liability as an employer, and contained no refund counterclaim. Responding to the NYSA counterclaim, the commission alleged as affirmative defenses that the NYSA payments were voluntary and paid as a compromise, that payments from January 1, 1973 through March 21, 1975 were made by the Funds rather than NYSA, that administrative remedies had not been complied with and that NYSA had never protested payments made by it on the grounds alleged in its counterclaim.

The commission after appropriate discovery moved for summary judgment dismissing plaintiffs' complaint and the NYSA counterclaim and asking for judgment on its own counterclaim. Plaintiffs and NYSA cross-moved for summary judgment in favor of plaintiffs on their first cause of action and in favor of NYSA declaring the assessments illegal and enjoining their collection, dismissing the

commission counterclaim and awarding NYSA a money judgment refunding the amounts paid to the commission. The Funds and their trustees also cross-moved for summary judgment dismissing the commission's counterclaim on the ground, among others, that they are not "employers" within the meaning of section 9858. Special Term denied the commission's motion and granted declaratory judgment to plaintiffs and counterclaim-defendants on their cross-motions and summary judgment to NYSA for all amounts paid within six years prior to service of its counterclaim, with interest, a total of $4,063,145.10. The Appellate Division affirmed, without opinion, but granted leave to appeal to our court.

NYSA is a membership corporation, the members of which consist of steamship operators, stevedores, terminal operators and other firms performing related services for the shipping industry. NYSA acts as a multiemployer bargaining association, negotiating for its members with labor organizations, including the International Longshoremen's Association, and administering collective bargaining agreements.

At the inception of the commission in 1953, longshoremen were receiving vacation and holiday payments in addition to wages. Payment of the commission's assessment, computed on both wages and vacation and holiday pay was until December 31, 1972 made through NYSA's Central Records Bureau, and was made "under protest to avoid penalties under the Act because the assessment is in conflict with the United States Constitution." [5] Funds for the

[5] The constitutionality of the act, sustained many times by Federal, New York and New Jersey courts (the decisional history is set forth in *International Longshoremen's Assn.* v *Waterfront Comm. of N. Y. Harbor,* 642 F2d 666, 668-669), is not in issue in this proceeding.

payment were obtained by NYSA assessment against its members, which until October 1, 1969 was made on a manhour basis, and thereafter on a combined manhour/tonnage formula, the components of which have changed from time to time until at present the manhour component is but 3% of the total.[6] Guaranteed annual income payments began in April, 1966, and caused the establishment by NYSA of a GAI Benefits Fund. Payments to the commission on GAI benefits were likewise made through NYSA's Central Records Bureau and made under protest.

In 1971 there was created by collective bargaining agreement between NYSA and ILA the NYSA-ILA Fringe Benefit Escrow Fund, into which shipping and stevedoring companies pay NYSA-ILA assessments for a variety of benefits. At the same time but as separate funds the NYSA-ILA Vacation and Holiday Fund and the NYSA-ILA GAI Fund (both defendants on the commission's counterclaim) were created. The needs of the two latter funds are met as required by payment from the Fringe Benefit Escrow Fund. From January 1, 1973 until March 31, 1975, the commission's assessment on vacation and holiday benefits and on GAI benefits was paid by the particular fund, under like protest.

NYSA and ILA then advised the commission that the Vacation and Holiday Fund and GAI Fund were not subject to commission assessments, the commission countered

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[6] The history of the assessments is reviewed in proceedings relating to approval of the tonnage component by the Federal Maritime Commission as required by section 15 of the Shipping Act (US Code, tit 46, §814), *Transamerican Trailer Transp.* v *Federal Mar. Comm.* (492 F2d 617), and *New York Shipping Assn.* v *Federal Mar. Comm.* (495 F2d 1215; see, also, *Volkswagenwerk* v *Federal Mar. Comm.*, 390 US 261).

by demanding information from the employer-members of NYSA (the plaintiffs in this proceeding) as to the payments made by each to NYSA for vacation, holiday and GAI benefits and the employer-members protested both the demand for information and the commission's ensuing deficiency notices addressed to them individually on the ground that the commission was empowered to assess only "gross payroll payments of employers of registered and licensed employees." At that juncture there was presented to the NYSA Board "a proposed resolution which would settle, without litigation, the Waterfront Commission assessment issue." That resolution, which was adopted, provided that NYSA pay the commission assessment on "amounts actually paid to registered and licensed employees for GAI, Vacation and Holiday benefits" out of sums paid to NYSA by carrier and employer-members for tonnage/manhour contributions, but also provided that NYSA could discontinue such payments by giving the commission 30 days' written notice, such notice being without prejudice to a commission assessment against employers directly. Payments were made by NYSA pursuant to that resolution for the remainder of 1975, and all of 1976 and 1977. Payments were discontinued, following notice to the commission, with the payment dated February 24, 1978 for the final quarter of 1977.[7] Following an information demand by the commission preparatory to assessment against employer-members of NYSA and protest by NYSA on their behalf, a stipulation was entered into between the com-

[7] The counterclaim and the commission's reply agree that this is the fact, but the stipulation as to interest, dated March 12, 1980, shows a payment dated February 28, 1978 in the amount of $56,972.08 and a payment dated April 4, 1978 in the amount of $32,907.18.

mission and plaintiffs pursuant to which, rather than proceed by way of deficiency assessment imposed by the commission, the instant declaratory judgment action was begun by the employer-member-plaintiffs.

Plaintiffs concede that longshore employees may work for one employer one day and another employer the next and are, therefore, considered industry employees rather than employees of a particular employer. As a result, the direct employer pays his longshore employees the hourly wages due them but fringe benefits are paid through an industry pool, originally the Central Records Bureau, and since establishment of the counterclaim-defendant Funds, through them.

Eligibility for vacation and holiday benefits depends upon the work history of an employee during 10 out of the past 12 years, the hours worked during the preceding year and the hours credited to the employee from work hours, compensation hours, disability hours, GAI hours, and reporting hours on days when work was not available for the employee. To receive maximum vacation benefits an employee must have received credit for 700 hours in 10 of the 12 preceding years and at least 1500 hours in the immediately preceding contract year. During the fiscal year ended September 30, 1976, vacation payments totaled over $19,000,000 and holiday benefits in excess of $9,500,000. The Vacation and Holiday Fund is tax exempt but income taxes are withheld on, and Social Security as well as Federal and State unemployment taxes are paid on vacation and holiday benefits paid to individual employees, each of whom receives from the Fund a withholding form (W-2) showing the total received by him and the tax deductions made. Social Security and unemployment taxes are, with

the consent of the taxing authorities, allocated among the direct employers on the basis of the hours worked by the employee for each employer. As to the Social Security and State unemployment taxes, the direct employer files a return, taking credit for amounts already paid by the Fund. As to Federal unemployment taxes, the Fund pays to the employer its allocated portion of the taxes due and the employer files the necessary return and pays the taxes.

GAI benefits are paid only to employees who are registered and eligible to work and who make themselves available for work but for whom no work is available. To be eligible for such payments an employee must have worked 700 or more hours in his "qualifying" year and received wages or GAI payments for 700 or more hours in the last contract year of the preceding collective bargaining agreement. He must also, unless he has been called to direct employment, "badge-in" daily at a commission employment center (or as to maintenance employees at the union hiring hall), thus signifying his availability for work, remain there until all available jobs have been filled and accept, in inverse order of seniority, any available work on pain of a GAI debit and, after three such debits, the loss of his right to any GAI payment for the next 12 months. He may not be otherwise employed on a GAI credit day between the hours of 8:00 A.M. and 5:00 P.M. The GAI Fund makes biweekly payments to eligible recipients. During the fiscal year ended September 30, 1976, 5,098 workers received GAI benefits, 556 of them receiving the maximum benefit of $16,640 for doing no work at all, and 2,000 of them receiving at least $10,000. Total GAI benefits paid in that year were in excess of $30,000,000.

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Since 1971 income taxes have been withheld on GAI payments and each recipient receives a W-2 form and is subject to income taxes on the amounts received. The Internal Revenue Service has, however, ruled that such payments are supplemental unemployment benefits and not subject to Social Security or Federal unemployment taxes. GAI payments do not disqualify an employee for State unemployment benefits, but such unemployment benefits are deducted from GAI benefits payable to the employee.

The collective bargaining agreement between NYSA and ILA includes GAI benefits in the base upon which vacation and holiday benefits as well as other fringe benefits of a longshoreman are calculated, and the dues checkoff authorization directs the longshoreman's employer, NYSA and the Funds "to deduct from my wages and earnings, earned and guaranteed, received by me by reason of my employment under a collective bargaining agreement" dues owed to ILA.

The GAI benefits program came into being because of the development of containerized cargo which beginning in 1958 reduced work opportunities and thus displaced longshoremen. The tonnage assessment by the NYSA-ILA Fringe Benefit Escrow Fund has replaced the manhour assessment in great part, in order to put the responsibility upon carriers who benefited from automation in handling cargo, to protect nonautomated carriers from costs arising out of automation, and to protect longshoremen from the resulting job displacement. Manhour assessment continues only with respect to passenger vessels and a group of bulk commodities which account for some 3% of the total NYSA-ILA assessment.

Special Term concluding, as do we, that the papers presented no triable issue concerning the above facts held, without reaching the question whether vacation and holiday or GAI payments are "gross payroll payments" within the meaning of section 9858, that that section as a taxing statute must be construed most strongly against the government and in favor of the taxpayer and that the payments in question not being made by employers and not being paid for work or labor performed, were not covered by the section. As already noted, the Appellate Division affirmed, without opinion.

We disagree, concluding that the Compact, of which section 9858 is a part, (a) imposes an assessment rather than a tax; (b) with the purpose of imposing upon the industry, by an assessment measured by labor costs, the cost of eliminating unsavory and illegal employment and labor practices; (c) covers vacation and holiday and GAI payments which, though paid for *not* performing labor, and paid through tax-exempt trusts, are part of the labor costs within the meaning of the words "gross payroll payments" used in the section; and (d) permits assessment against the plaintiffs as well as the trusts with respect to such payments.

II

Section 9858 provides, so far as pertinent to this question, that: "After taking into account such funds as may be available to it from reserves, federal grants or otherwise, the balance of the commission's budgeted expenses shall be assessed upon employers of persons registered or licensed under this compact. Each such employer shall pay to the

commission an assessment computed upon the gross payroll payments made by such employer to longshoremen * * * for work or labor performed * * * at a rate, not in excess of two per cent computed by * * * [estimating] the gross payroll to be made by employers subject to assessment * * * [at a rate] which will yield revenues sufficent to finance the commission's budget for each year." Section 9861 declares the assessment to be "in lieu of any other charge for the issuance of licenses to stevedores * * * or for the registration of longshoremen or for the use of an employment information center." The budget, which may include a reasonable amount for a reserve to "be used for the stabilization of annual assessments, the payment of operating deficits and for the repayment of advances made by the two states" (§9858), is subject to disapproval or reduction by either Governor. To the extent the estimated yield of the section 9858 assessment falls short of balancing the budget, the Legislatures of the two States are required by the Compact to appropriate the amount of the shortfall "in proportion to the gross annual wage payments made to longshoremen for work in each state" (§9859).

Threshold questions concerning the interpretation of these provisions relate to whether the contention that the section imposes not a tax but an assessment may be made to us not having been advanced below, and what law governs. Were the former argument a new one, it would nonetheless be proper for us to consider it because it is not a contention that could have been "obviated or cured by factual showings or legal countersteps" (*Telaro* v *Telaro*, 25 NY2d 433, 439), turning as it does on legislative intent.

Moreover, the issue being legislative intent, the rule requiring strict construction of tax statutes yields to the explicit declaration of that intent in the statute itself (*Williamsburgh Power Plant Corp.* v *City of New York*, 255 App Div 214, affd 280 NY 551; see, also, *Matter of Consolidated Edison Co. of N.Y.* v *City of New York*, 44 NY2d 536, 541). Here the Compact in section 9872 directs that: "In accordance with the ordinary rules for construction of interstate compacts this compact shall be liberally construed to eliminate the evils described therein and to effectuate the purposes thereof." That language refers to the entire Compact, from which section 9858 and related sections, whether they impose an assessment or a tax, may not be excluded simply because they deal with the raising of funds necessary to effectuate the Compact's purposes.

Somewhat more complex is the determination of what law governs, the complicating factor being that the legislation to be construed is the product of not one but three legislative bodies. Our determination in *Matter of Bell* v *Waterfront Comm. of N.Y. Harbor* (20 NY2d 54, 61) that construction of an interstate compact (indeed, the very compact now under consideration) is "a matter of Federal rather than State law" accords with the Supreme Court's recent holding in *Cuyler* v *Adams* (449 US 433, 438, 442) that interpretation of a compact the subject matter of which is appropriate as a subject of Congressional legislation (as of course is waterfront governance, closely related as it is to interstate and foreign commerce) presents a question of Federal law. Thus, while uniformity of interpretation by the courts of New York and New Jersey is to be desired (cf. *Murphy* v *Waterfront Comm.*, 39 NJ 436, affd in part 378 US 52), it is a uniformity born not of

comity but of the fact that each, in interpreting the Compact, is expounding Federal not State law. Thus, also, while State legislative history has bearing and is not to be ignored, the history of the Compact before the Congress is an essential of interpretation (cf. *DeVeau* v *Braisted*, 363 US 144, 149-151).

The nature of the exaction authorized by section 9858 cannot be doubted after review of its legislative history. As part of the approval process a hearing on the Compact was held before a subcommittee of the House Judiciary Committee of which our erstwhile colleague, Kenneth Keating, then a Congressman, was chairman. Appearing before that subcommittee, Congressman Emanuel Celler raised a number of questions concerning the legality and constitutionality of various provisions of the Compact (Hearing before Subcommittee No. 3 of the Committee on Judiciary, House of Representatives, 83d Cong., 1st Sess, on HR 6286, HR 6321, HR 6343 and S 2383, p 50 ff). One such was whether "by levying assessments and other charges on shipowners [*sic*] and the shipping industry * * * the proposed agency * * * [was not] accomplishing by indirection that which the Constitution directly forbids" (*id.*, p 53).[8] The answer, provided by Austin J. Tobin, Executive Director of the Port of New York Authority (itself a "compact" agency charged with recommending measures for the better conduct of commerce in

[8] The reference was to article I §10, cl 3 of the Constitution providing that: "No State shall, without the Consent of Congress, lay any Duty of Tonnage * * * enter into any Agreement or Compact with another State * * *". The issue sought to be raised is difficult to understand in view of the fact, later pointed out in Director Tobin's response, that enactment of the bills under consideration would provide the required Congressional consent.

the port and one of the agencies authoring the Waterfront Commission Compact [*id.*, pp 77, 79]), was "that the provision in this bill is very distinctly not a tonnage tax but the assessment of *a fee for the cost of administration* and it is expressly provided in the compact as levied *in lieu of a license fee*" (*id.*, p 84; emphasis supplied).

The distinction between a license fee and a tax is, of course, one long understood in our law. A license fee has for its primary purpose the regulation or restriction of a business deemed in need of public control, the cost of such regulation being imposed upon the business benefited or controlled, whereas the primary purpose of a tax is to raise money for support of the government generally (*Head Money Cases*, 112 US 580, 595-596; *People ex rel Einsfeld* v *Murray*, 149 NY 367, 376-377; see *Cox* v *New Hampshire*, 312 US 569, 577; *Reconstructionist Synagogue of North Shore* v *Incorporated Vil. of Roslyn Harbor*, 40 NY2d 158, 162; *Paramount Film Distr. Corp.* v *State of New York*, 30 NY2d 415, 421-422; *People* v *Brooklyn Garden Apts.*, 283 NY 373, 381-382; 53 CJS, Licenses, §3, p 451). The benefits to the industry—elimination of the evils in employment and employment practices and the adverse effect of those practices on the commerce of the port—are made clear both by the Compact's legislative findings[9] and

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[9] The evils referred to are set forth at length in sections 9802-9805, but are sufficiently suggested by the findings in section 9802 that "waterfront laborers suffer from irregularity of employment, fear and insecurity, inadequate earnings, an unduly high accident rate, subjection to borrowing at usurious rates of interest, exploitation and extortion as a price of securing employment and a loss of respect for the law * * * [which result in] destruction of the dignity of an important segment of American labor * * * [and] direct encouragement of crime which imposes a levy of greatly increased costs on food, fuel and other necessaries handled in and

by its legislative history.[10] Those findings and that history are persuasive evidence of a legislative intent to correct the evils referred to by a program the cost of which was to be related to gross payroll payments because the new waterfront program would in major part redound to the benefit of employers.

In view of the purpose, scope and background of the Compact and of the supplemental legislation enacted by New York (§§ 9901-9937) and New Jersey (NJ Stats Ann, § 32:23-74 ff) pursuant to explicit Congressional authorization to amend and supplement the Compact (§9870; see *DeVeau* v *Braisted*, 363 US 144, 153-154, *supra*), and the relationship between the use to which the assessment was to be put and the base against which it was to be made, there can be little question that the legislative intent was to encompass in the words "gross payroll payments" the labor costs of the industry, however incurred.[11]

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through the port of New York." The evidentiary basis for these legislative findings is set forth at length in the Congressional hearings, above referred to, in the Fourth Report of the New York State Crime Commission (NY Legis Doc [1953], No. 70), the Report of the New Jersey Law Enforcement Council (1953), and in *DeVeau* v *Braisted* (363 US, *supra*, at pp 147-151).

[10] Thus, the Summary of the Act to Establish the Waterfront Commission that had been presented to New Jersey's legislators prior to that State's adoption of the Compact was made part of the Congressional Hearings during the testimony of Governor Driscoll of New Jersey (Hearings, *supra*, at p 22). That document after reviewing the provisions concerning expenses of administration stated (*id.*, at p 47): "It is felt that the savings to employers and consignees which may be obtained through a reduction in pilferage, the elimination of 'phantom' employees from the payroll, and other exactions and levies on commerce will greatly exceed the cost of administration of the waterfront commission program."

[11] Thus, appropriations by the two States of any budget shortfall is, as above noted, required to be "in proportion to gross annual wage payments made to longshoremen for work in each State."

But, say plaintiffs and counterclaim-defendants, so to hold ignores the fact that for purposes of other laws the payments in question are not treated as wages, the use in section 9858 of the words "for work or labor performed", and the pre-emptive effect of Federal tax and pension laws. As concerns the interpretation of other laws the short answer is that each is to be construed in relation to its own background and legislative history and that, therefore, such constructions (not all of which disagree with the conclusion we now reach) are not entitled to great weight in the construction of the Compact (cf. *Central Illinois Public Serv. Co.* v *United States,* 435 US 21, 29).

No more determinative is the fact that GAI and vacation and holiday benefits are paid for periods during which the recipient has not physically performed as a longshoreman. As the Supreme Court has recognized, vacation and holiday benefits are "a form of short-term compensation for work performed" (*Foster* v *Dravo Corp.*, 420 US 92, 100). Furthermore, such payments were being made when the commission was established and eligibility to receive such benefits turns on work or labor as a longshoreman having been performed in the past. That the work and the payment do not coincide does not put such payments beyond the reach of section 9858.

GAI benefits are likewise within the coverage of the statute. Not only does eligibility turn on previous work as a longshoreman, but also the conditions with which a recipient must conform on a particular day to receive benefits for that day make it difficult to conclude that, though not engaged in handling cargo, he has not worked or performed labor. Thus, he is required to appear at a particular time and place, not to engage in work for

others during usual working hours, and to accept stevedoring work when available on pain of losing the right to payment for days on which work is not available (see *Armour & Co.* v *Wantock*, 323 US 126, 133; *Kore* v *Celebrezze*, 342 F2d 638). Moreover, the Legislatures of New York and New Jersey, by enacting provisions supplementary to the Compact in 1966, have agreed that GAI benefits may be regarded as paid for work. Thus, section 9907, which governs when a longshoreman can be removed from the commission's register, directs that "the commission shall count as actual work the compensation received by any longshoreman pursuant to the guaranteed wage provisions of any collective bargaining agreement relating to longshoremen", and paragraphs (a) and (f) of subdivision 2 of section 9920 require the commission, in deciding when to accept and when to suspend acceptance of applications for the register, to encourage regularization of employment and consider the effects of technological change and automation.[12] Having thus acknowledged the necessity for regularization of employment in light of containerization and directed that GAI payments be counted as work, the Legislatures of the two States may be deemed to have considered those payments "gross payroll payments" made for "work or labor performed" within the meaning of section 9858.

The pre-emption argument is that Federal law supersedes State regulation of either the collective bargaining process

[12] Not without some significance in this respect is the checkoff authorization quoted in the text above, which refers to wages "earned or guaranteed." Though not an agreement with plaintiffs or counterclaim-defendants as to the nature of the payments and addressed, as to GAI payments, to the GAI Fund, it nevertheless indicates the view of the labor forces of the industry that GAI payments fall within the wage or payroll concept.

or the terms of labor agrements and that provisions of the Internal Revenue Code shield from taxation fringe benefit programs which result from collective bargaining. The issue before us, however, concerns neither Federal tax exemption nor regulation of collective bargaining, but whether the payments made from the Funds are subject to commission assessment under the provision of a bi-State compact approved by Congress.

Plaintiffs and NYSA suggest that the Compact must be regarded as a State law for pre-emption purposes notwithstanding Congressional approval. Not only did we hold to the contrary with respect to the same Compact here in issue (*Matter of Bell* v *Waterfront Comm. of N.Y. Harbor*, 20 NY2d 54, 63, n 4, *supra*), but the Supreme Court *in DeVeau* v *Braisted* (363 US 144, 153, *supra*) acknowledged with respect to the same Compact that as to a provision of the Compact itself (which §9858 is) "even the most subtle casuistry could not conjure up a claim of pre-emption." Because such a provision is, by reason of its Congressional approval, a Federal law, the question is not one of pre-emption, but at most of implied repeal by a later enacted Federal statute (*DeVeau* v *Braisted*, 363 US 144, *supra; Matter of Bell* v *Waterfront Comm. of N.Y. Harbor*, 20 NY2d 54, *supra; International Longshoremen's Assn.* v *Waterfront Comm. of N.Y. Harbor*, 642 F2d 666, 670, 672, *supra; New York Shipping Assn.* v *Waterfront Comm. of N.Y. Harbor* [DNJ Civ No. 78-995, pp 11, 12], affd 582 F2d 1275, cert den 439 US 1071). Nothing is advanced to support the conception of implied repeal[13] in the instant case, however.

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[13] The April 13, 1978 letter of the District Director of Internal Revenue which suggested that the exempt status of the Funds could be jeopardized by payment of assessments by the Funds was, as the

We conclude that payments from both Funds are within the commission's power of assessment under the Compact.

III

There remains the question whether the plaintiffs, or NYSA, or the Funds, or all three are liable for payment of the assessment. Plaintiffs, NYSA and the Funds each argue that it or they cannot be; the commission asks judgment that plaintiffs are, or in the alternative that the Funds are, or in the further alternative that NYSA is. We conclude that plaintiffs and the Funds are, and that NYSA if it understakes to act on behalf of plaintiffs or the Funds with respect to the assessment may make itself responsible for its payment, but otherwise is not.

The section speaks of assessment "upon employers of persons registered or licensed under this compact." Recipients of vacation and holiday pay and of GAI benefits are all licensed or registered, all have at some time in the past been employed by one of the plaintiffs and all, except for those GAI recipients with sufficient seniority that they perform no longshoring work during the year, are at some time during the year employed in such work by one of the plaintiffs.

More importantly, however, as is recognized throughout the papers of both sides in this matter and was recognized during the hearings on the Compact referred

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June 13, 1979 letter from the same office shows, "not concerned with the validity of the Waterfront Commission assessment" and in any event contains nothing to indicate that in reaching the conclusion that there might be jeopardy the director considered the effect of Congressional approval of the Compact.

to above (e.g., p 24), in the longshoring industry workers change employers from day to day, and as a result multi-employer bargaining is a vital factor (cf. *Labor Bd.* v *Truck Drivers Union,* 353 US 87, 94, 95). As a further consequence vacation and holiday benefits, which were being paid when the commission was established, though then paid upon the basis of the hours worked by an employee for his numerous employers, were being paid by the employers through NYSA's Central Records Bureau. The container revolution in materials handling produced both the need for guaranteed annual income payments to employees and the possibility of obtaining funds for the greater part of such payments from the carriers in the form of tonnage assessments, to which the carriers were willing to agree in order to obtain the cost-reduction and time-saving benefits of containerization and still maintain labor peace. Approval of such assessments by the Federal Maritime Commission and changes in tax and pension laws have resulted in the greater part of the payments formerly made by employers themselves through the Central Records Bureau being made at present from tonnage assessments against carriers into the NYSA-ILA Escrow Fund, which then transfers to the Vacation and Holiday Fund or the GAI Fund whatever moneys are needed to meet the payments required of it. The employers have acted jointly with the collective bargaining representatives of the employees to obtain the carriers as a source of money and the Funds (with their tax benefits) as a vehicle for payment. That, however, does not diminish the relationship of the employers to the "gross payroll payments" for "work or labor performed", which such benefits are, to such an extent as to insulate the employers from the commission's assessment power.

The commission, established to wipe out pre-existing evil and chaotic labor conditions, was intended to be funded primarily by assessment based upon the industry's labor costs, not by the taxpayers of the States which, with the consent of Congress, created the agency. To hold otherwise than we now do would permit the employers acting together with the unions to cut off completely the commission's assessment base by simply changing the vehicle through which they pay labor costs.

It follows that the plaintiffs, as employers, are assessable for vacation and holiday benefits and GAI benefits paid.[14] So also are the Funds, notwithstanding their trust provisions stating that they act as agent of no one and are not responsible for the debts or liabilities of NYSA or the employers, for as the payor of the benefits they may properly be regarded as the employer as to those benefits within the meaning of the assessment provision (cf. *Bunnell* v *New England Teamsters & Trucking Ind. Pension Fund*, 655 F2d 451, affg 486 F Supp 714).[15] NYSA, on the other hand, neither employs the individuals nor makes payment of the benefits. It would have no responsi-

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[14] The allocation of the assessments against individual employers is not now before us, the cross motion of plaintiffs and NYSA having been directed only to their first cause of action and the counterclaim and not to the second cause of action.

[15] The suggestion that payment to the Funds by the escrow fund of enough to pay both benefits and assessments on benefits may create a Federal tax problem for the Funds hardly seems real in light of the solution to the problem referred to in the district director's June 13, 1979 letter, but in any event would not be determinative of the issues before us. We note, however, that our holding is not that the Funds must pay the assessment, but rather that if the employers do not the commission may proceed against either the employers or the Funds to recover the assessment due, though of course it could recover but once.

bility for the assessment, therefore, except as it undertook to act for the employers or the Funds in relation to the assessment.

The commission is, on the record before us, therefore entitled to judgment on its counterclaim declaring that as to vacation and holiday payments made by NYSA-ILA Vacation and Holiday Fund, the Fund as well as the plaintiffs are liable for the commission assessment on such payments and that as to GAI benefits paid by NYSA-ILA GAI Fund, that Fund as well as the plaintiffs are liable for the commission assessment on such payments.

IV

The conclusions thus reached require dismissal of NYSA's refund counterclaim. Recovery of payments made by the Funds for periods prior to March 31, 1975 would be foreclosed in any event since the Funds themselves filed no counterclaim and NYSA's counterclaim alleges no facts from which NYSA's right to recover on behalf of the Funds can be inferred. But even if the Funds had counterclaimed, they would not be entitled to recover, since they paid assessments for which they as well as the plaintiffs were responsible. Their recourse, if any, would, therefore, be against plaintiffs.

With respect to the post-March 31, 1975 payments NYSA would, as above noted, have no responsibility except as it understook to act on behalf of the employers or the Funds in making the payments. At the time the NYSA payments began, however, the commission acknowledged that previous payments through NYSA had been made as a matter of procedural convenience and that it did not collect money from the NYSA-ILA Contract Board.

The August 6, 1975 resolution of NYSA pursuant to which the payments sought to be recovered were thereafter made, and which stated that it was adopted to "settle, without litigation, the Waterfront Commission assessment issue," could, therefore, have been adopted and the payments made only on behalf of the employers or the Funds or both. Because either the plaintiffs or the Funds could properly have been held for the assessments paid by NYSA and NYSA necessarily acted on the behalf of one or both, NYSA is entitled to no refund from the commission and must obtain any reimbursement, not already obtained by it, from plaintiffs or the Funds. It is, therefore, unnecessary to consider the commission's defenses to the NYSA counterclaim.

V

For the foregoing reasons the order of the Appellate Division should be reversed, with costs, the commission's motion for summary judgment granted, plaintiffs' and counterclaim-defendants' cross motions for summary judgment denied, and judgment granted in favor of the Waterfront Commission (1) dismissing the first cause of action of plaintiffs' complaint, (2) dismissing NYSA's counterclaim, (3) on the commission's counterclaim declaring that payments made by the Funds are subject to assessment pursuant to section 9858 and that plaintiffs as well as the Funds are employers liable for the payment of such assessment but that NYSA is not such an employer, and (4) severing the plaintiffs' second cause of action for such further proceedings as they may be advised to seek.

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Appendix A—Judgment and Opinion of the Court of Appeals of the State of New York

Chief Judge Cooke and Judges Jasen, Gabrielli, Jones, Wachtler and Fuchsberg concur.

Order reversed, with costs, the Waterfront Commission's motion for summary judgment granted, plaintiffs' and counterclaim-defendants' cross motions for summary judgment denied, and judgment granted in favor of the Waterfront Commission in accordance with the opinion herein.

Decided February 11, 1982

APPENDIX B

Order of the Appellate Division of the Supreme Court of the State of New York Granting Leave to Appeal

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 19, 1981.

M-423

Present

Hon. JOSEPH P. SULLIVAN, *Justice Presiding,*
DAVID ROSS, JOHN CARRO,
VINCENT A. LUPIANO, ARNOLD L. FEIN,
Justices.

THE AMERICAN SUGAR REFINING COMPANY OF NEW YORK; ATLANTIC CONTAINER LINE (G.I.E.); DANIELS & KENNEDY, INC.; GLOBAL TERMINAL & CONTAINER SERVICES, INC.; HAMILTON MARINE CONTRACTING CO., INC.; HAMILTON TERMINAL CORPORATION; HELLENIC LINES LIMITED; FRANK J. HOLLERAN, INC; HOWLAND HOOK MARINE TERMINAL OPERATING CO.; INTERNATIONAL TERMINAL OPERATING CO.; INC.; LEDOUX CRANE CORP.; LEE & PALMER, INC.; LIPSETT STEEL PRODUCTS, INC.; JOHN W. MCGRATH CORPORATION; MAERSK CONTAINER SERVICE CO., INC.; MAHER TERMINAL INC.; R. MARTORELLA & CO., INC.; M.I. SPECIAL SERVICES CORP.; M.I. STEVEDORES, INC.; MOORE MCCORMACK LINES, INC.; NORTHEAST MARINE TERMINAL CO., INC.; NORTHEAST STEVEDORING CO., INC.; PITTSTON STEVEDORING CORP.; PROLERIZED SCHIABONEU COMPANY; QUIN MARINE SERVICES, INC.; SEA-LAND SERVICE, INC.; TEMCO SERVICE INDUSTRIES, INC.; UNITED TERMINALS INC.; UNIVERSAL MARITIME SERVICE CORP.: and UNION MINERALS & ALLOYS CORP.,

Plaintiffs-Respondents,

Appendix B—Order of the Appellate Division of the Supreme Court of the State of New York Granting Leave to Appeal

—against—

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Defendant-Appellant.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Counterclaim-Plaintiff-Appellant,

—against—

NYSA-ILA VACATION AND HOLIDAY FUND, NYSA-ILA GAI FUND, THOMAS W. GLEASON, SR., JOHN BOWERS, VINCENT COLUCCI, CAROL GARDNER, WILLIAM P. LYNCH, WILLIAM MURPHY, ANTHONY SCOTTO, WALTER L. SULLIVAN, ANTHONY ANASTASIO, JAMES J. DICKMAN, ROBERT F. CHIARELLO, JAMES G. COSTELLO, C.H.C. EVERHARD, JOHN J. FARRELL, JR., DAGFINN GUNNARSHAUG, MICHAEL E. MAHER, JOSEPH F. MCGOLDRICK, FRANCIS X. MCQUADE, DONALD J. SCHMIDT, individually and as Trustees of the NYSA-ILA VACATION AND HOLIDAY FUND and the NYSA-ILA GAI FUND, and NEW YORK SHIPPING ASSOCIATION, INC.,

Counterclaim-Defendants-Respondents.

The above-named defendant-appellant and counterclaim-plaintiff-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered on December 23, 1980,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in sup-

Appendix B—Order of the Appellate Division of the Supreme Court of the State of New York Granting Leave to Appeal

port of said motion and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is granted and this Court, pursuant to CPLR 5713, states that questions of law have arisen which ought to be reviewed by the Court of Appeals.

ENTER:

JOSEPH J. LUCCHI
Clerk.

APPENDIX C

Judgment of the Appellate Division of the Supreme Court of the State of New York

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 23, 1980.

Present:

HON. ARNOLD L. FEIN, *Justice Presiding,*
JOSEPH P. SULLIVAN, DAVID ROSS, VINCENT A. LUPIANO, JOHN CARRO, *Justices.*

9700

THE AMERICAN SUGAR REFINING COMPANY OF NEW YORK; ATLANTIC CONTAINER LINE (G.I.E.); DANIELS & KENNEDY, INC.; GLOBAL TERMINAL & CONTAINER SERVICES, INC.; HAMILTON MARINE CONTRACTING CO., INC.; HAMILTON TERMINAL CORPORATION; HELLENIC LINES LIMITED; FRANK J. HOLLERAN, INC.; HOWLAND HOOK MARINE TERMINAL OPERATING CO.; INTERNATIONAL TERMINAL OPERATING CO.; INC.; LEDOUX CRANE CORP.; LEE & PALMER, INC.; LIPSETT STEEL PRODUCTS, INC.; JOHN W. MCGRATH CORPORATION; MAERSK CONTAINER SERVICE CO., INC.; MAHER TERMINAL INC.; R. MARTORELLA & CO., INC.; M.I. SPECIAL SERVICES CORP.; M.I. STEVEDORES, INC.; MOORE MCCORMACK LINES, INC.; NORTHEAST MARINE TERMINAL CO., INC.; NORTHEAST STEVEDORING CO., INC.; PITTSTON STEVEDORING CORP.; PROLERIZED SCHIABO-NEU COMPANY, QUIN MARINE SERVICES, INC.; SEA-LAND SERVICE, INC.; TEMCO SERVICE INDUSTRIES, INC.; UNITED TERMINALS INC.; UNIVERSAL MARITIME SERVICE CORP.; and, UNION MINERALS & ALLOYS CORP.,

Plaintiffs-Respondents,

Appendix C—Judgment of the Appellate Division of the Supreme Court of the State of New York

—against—

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Defendant-Appellant.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Counterclaim-Plaintiff-Appellant,

—against—

NYSA-ILA VACATION AND HOLIDAY FUND, NYSA-ILA GAI FUND, THOMAS W. GLEASON, SR., JOHN BOWERS, VINCENT COLUCCI, CAROL GARDNER, WILLIAM P. LYNCH, WILLIAM MURPHY, ANTHONY SCOTTO, WALTER L. SULLIVAN, ANTHONY ANASTASIO, JAMES J. DICKMAN, ROBERT F. CHIARELLO, JAMES G. COSTELLO, C. H. C. EVERHARD, JOHN J. FARRELL, JR., DAGFINN GUNNARSHAUG, MICHAEL E. MAHER, JOSEPH F. MCGOLDRICK, FRANCIS X. MCQUADE, DONALD J. SCHMIDT, individually and as Trustees of the NYSA-ILA VACATION AND HOLIDAY FUND and the NYSA-ILA GAI FUND, and NEW YORK SHIPPING ASSOCIATION, INC.,

Counterclaim-Defendants-Respondents.

An appeal having been taken to this Court by the appellant from the judgment of the Supreme Court, New York County (Riccobono, J.), entered on March 12, 1980, which, *inter alia,* denied its motion for summary judgment,

And said appeal having been argued by Mr. Irving Malchman, of counsel for the appellant, and by Mr. Donato Caruso, of counsel for the plaintiffs-respondents

and counterclaim-defendant-respondent New York Shipping Association, and by Ernest L. Mathews, Jr., of counsel for all counterclaim-defendants-respondents except New York Shipping Association,

And due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

JOSEPH J. LUCCHI,
Clerk.

APPENDIX D

Opinion of the Supreme Court of the State of New York

JUSTICE RICCOBONO

American Sugar Refining Co. of N.Y. v. *Waterfront Commission of N.Y. Harbor*—This proceeding concerns the taxing authority of the Waterfront Commission of New York Harbor ("the Waterfront Commission"), a bi-state agency created in 1953 by compact between the States of New York and New Jersey under the Waterfront Commission Act. (New York Laws of 1953, C.882, New Jersey Laws of 1953 C. 202, as amended and as codified in New York Unconsolidated Laws § 9801 et seq. and verbatim statutes of New Jersey), with the approval of Congress (67 Stat. 451).

Pursuant to Unconsolidated Laws § 9858, the Waterfront Commission is authorized to levy:

> "... *upon employers licensed under this compact* ... an assessment computed upon the gross payroll payments paid by such employer to longshoremen, pier superintendents, hiring agents and port watchmen *for work or labor performed within the port of New York district,* at a rate, not in excess of two percent. ..." (Court's italics)

At issue in this proceeding is whether the Waterfront Commission's taxing jurisdiction under the above statute extends to Guaranteed Annual Income ("GAI") and Vacation and Holiday ("V&H") benefits paid to longshoremen in the Port of New York District.

GAI benefits are paid to longshoremen, usually with the greatest seniority, as income insurance, usually in return for waiving seniority rights to employment in favor of longshoremen with less seniority. V&H benefits are paid to longshoremen based upon a complex formula which takes

into account not only experience and work performed, but also disability, workmen's compensation, and GAI benefits received. GAI and V & H benefits are paid to those longshoremen who receive them not directly by their employers, the stevedoring and shipping companies, but by trust funds established by cooperation of the stevedoring and shipping companies and the labor union which represents the longshoremen.

The Court notes that while withholding taxes are applied by the funds against GAI and V & H benefits pursuant to § 3402 of the Internal Revenue Code the withholding is made not as against "wages" pursuant to subdivision (a) of tnat section but rather as against supplemental benefits pursuant to subdivision (o). The Court further notes that the Internal Revenue Service has afforded the GAI and V & H funds tax exempt status pursuant to paragraphs (5) and (17) of § 501(c) of the Internal Revenue Code.

The Court further notes the clear mandate that a taxing statute must be construed most strongly against the government and in favor of the taxpayer. (Gould v Gould, 245 U.S. 151; Roosevelt Raceway, Inc. v Bedell, 24 Misc 2d 374, affd. 12 AD 2d 787).

GAI and V & H benefits are not paid by employers of longshoremen. Nor are they paid for work or labor performed. (See, Central Illinois Public Service Co. v United States, 435 U.S. 21, Morgan v Laborers Pension Trust Fund, 433 F Supp. 518, 530). The Court notes that GAI and V & H benefits are not payments within the wording of the taxing statute under construction. The question of whether or not such payments are "gross payroll payments" is not reached.

Appendix D—Opinion of the Supreme Court of the State of New York

The argument of the Waterfront Commission that the Court should look beyond the actual structure for the payment of GAI and V & H benefits on the ground that the funds, for complex historical reasons, were established as a "procedural convenience to the industry" and in fact represent the employers is rejected.

Further, it is no defense to the Waterfront Commission that the funds have paid the payroll taxes for many years without protest before seeking the present judicial determination (Roosevelt Raceway, Inc. v Bedell, supra).

The main motion of the defendant Waterfront Commission for summary judgment upon its claim for declaratory judgment in regard to the foregoing issues is denied. The cross motions of the plaintiffs and counterclaim defendants, the stevedores, shipping companies and the funds and their trustees, are granted in so far as they seek declaratory judgment. Insofar as the cross-motions seek return of taxes paid, they are granted as to assessments herein ruled invalid, paid up to six years prior to the commencement of this action.

Settle judgment.

Dated: Nov. 15, 1979

/s/ XCK
J.S.C.

APPENDIX E

Judgment of the Supreme Court of the State of New York

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the courthouse thereof, located at 60 Centre Street, in the City, County and State of New York, on the 4th day of March, 1980.

Present:

HON. XAVIER C. RICCOBONO,

Justice.

Index No. 11662/78

THE AMERICAN SUGAR REFINING COMPANY OF NEW YORK; ATLANTIC CONTAINER LINE (G.I.E.); DANIELS & KENNEDY, INC.; GLOBAL TERMINAL & CONTAINER SERVICES, INC.; HAMILTON MARINE CONTRACTING CO., INC.; HAMILTON TERMINAL CORPORATION; HELLENIC LINES LIMITED; FRANK J. HOLLERAN, INC.; HOWLAND HOOK MARINE TERMINAL OPERATING CO.; INTERNATIONAL TERMINAL OPERATING CO., INC.; LEDOUX CRANE CORP.; LEE & PALMER, INC.; LIPSETT STEEL PRODUCTS, INC.; JOHN W. MCGRATH CORPORATION; MAERSK CONTAINER SERVICE CO., INC.; MAHER TERMINAL INC.; R. MARTORELLA & CO., INC.; M.I. SPECIAL SERVICES CORP.; M.I. STEVEDORES, INC.; MOORE MCCORMACK LINES, INC.; NORTHEAST MARINE TERMINAL CO., INC.; NORTHEAST STEVEDORING CO., INC.; PITTSTON STEVEDORING CORP.; PROLERIZED SCHIABO-NEU COMPANY, QUIN MARINE SERVICES, INC.; SEA-LAND SERVICE, INC.; TEMCO SERVICE INDUSTRIES, INC.; UNITED TERMINALS INC.; UNIVERSAL MARITIME SERVICE CORP.; and, UNION MINERALS & ALLOYS CORP.,

Plaintiffs,

Appendix E—Judgment of the Supreme Court of the State of New York

—against—

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Defendant.

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by original summons and between the said

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Counterclaim-Plaintiff,

—against—

NYSA-ILA VACATION AND HOLIDAY FUND, NYSA-ILA GAI FUND, THOMAS W. GLEASON, SR., JOHN BOWERS, VINCENT COLUCCI, CAROL GARDNER, WILLIAM P. LYNCH, WILLIAM MURPHY, ANTHONY SCOTTO, WALTER L. SULLIVAN, ANTHONY ANASTASIO, JAMES J. DICKMAN, ROBERT F. CHIARELLO, JAMES G. COSTELLO, C. H. C. EVERHARD, JOHN J. FARRELL, JR., DAGFINN GUNNARSHAUG, MICHAEL E. MAHER, JOSEPH F. MCGOLDRICK, FRANCIS X. MCQUADE, DONALD J. SCHMIDT, individually and as Trustees of the NYSA-ILA VACATION AND HOLIDAY FUND and the NYSA-ILA GAI FUND, and NEW YORK SHIPPING ASSOCIATION, INC.,

Counterclaim-Defendants.

Defendant-counterclaim-plaintiff Waterfront Commission of New York Harbor (hereinafter "Commission"), having duly moved for summary judgment pursuant to CPLR 3212, and plaintiffs and counterclaim-defendants having duly crossed-moved for summary judgment pursuant to CPLR 3212, and said motion and cross motions having regularly come on to be heard,

Now, upon reading and filing:

Appendix E—Judgment of the Supreme Court of the State of New York

(1) The pleadings heretofore filed herein, consisting of the Summons and Complaint, both dated July 5, 1978; Plaintiffs' Response to Defendant's Discovery Request, dated April 26, 1978, with the exhibits attached thereto; Plaintiffs' Supplemental Response to Defendant's Discovery Request, dated May 4, 1978; the Summons to Additional Defendants on Counterclaim and the Commission's Answer with Counterclaim, both dated August 9, 1978; the Commission's Answer with Amended Counterclaim, dated September 26, 1978; the Reply of Counterclaim-Defendants other than Counterclaim-Defendant New York Shipping Association, Inc. (hereinafter "NYSA") to the Commission's Amended Counterclaim, dated October 20, 1978; the Reply of Plaintiffs and Answer and Counterclaim of NYSA, dated October 20, 1978; and, the Commission's Answer to Counterclaim of NYSA, dated December 19, 1978;

(2) The Commission's Notice of Motion for Summary Judgment, dated March 27, 1979; the Affidavit of Leonard Newman, sworn to on the 27th day of March, 1979, with exhibits attached thereto; and, the Reply Affidavits of Jesse O. Langston and Marvin Weissman, both sworn to on the 15th day of June, 1979, with the exhibits attached thereto, submitted in support of the Commission's motion for summary judgment and in opposition to the cross-motion of plaintiffs and counterclaim-defendant NYSA for summary judgment;

(3) The Notice of Cross-Motion for Summary Judgment of Counterclaim-Defendants other than NYSA, dated May 21, 1979; and

(4) The Notice of Cross-Motion for Summary Judgment of Plaintiffs and Counterclaim-Defendant NYSA, dated May 21, 1979; the Affidavits of James J. Dickman and John M. Haynes, both sworn to on the 18th day of May, 1979, with the exhibits attached thereto; and, the Supplemental Affidavit of James J. Dickman, sworn to on the 29th day of June, 1979, with the exhibits attached thereto, submitted in opposition to the Commission's motion for summary judgment and in support of the cross-motion of plaintiffs and counterclaim-defendant NYSA for summary judgment;

and after hearing Gerarld [*sic*] P. Lally, Esq., the Commission's General Counsel for the Commission; Ernest L. Matthews, [*sic*] Esq., of the law office of Thomas W. Gleason, Esq., of counsel, for counterclaim-defendants other than NYSA and, Donato Caruso, Esq., of the firm of Lorenz, Finn, Giardino & Lambos, of counsel, for the plaintiffs and for counterclaim-defendant NYSA; and after due deliberation and the filing of a decision in writing on the 16th day of November, 1979, in favor of plaintiffs and counterclaim-defendants,

Now, upon motion of Lorenz, Finn, Giardino & Lambos, attorneys for plaintiffs and counterclaim-defendant NYSA, it is

ORDERED, ADJUDGED AND DECREED, that the Commission's motion for summary judgment be and the same is hereby in all respects denied and the cross-motions of plaintiffs and counterclaim-defendants for summary judgment insofar as they seek declaratory judgment be and the same are hereby in all respects granted, and it is further

ORDERED, ADJUDGED AND DECREED, that the Commission's counterclaim against plaintiffs and counterclaim-defen-

dants be and the same is hereby in all respects dismissed upon the merits, and it is further

ORDERED, ADJUDGED AND DECREED, that the Commission's affirmative defenses to the counterclaim of counterclaim-defendant NYSA be and the same are hereby in all respects denied and stricken upon the merits, and it is further

ORDERED, DECLARED, ADJUDGED AND DECREED, that Guaranteed Annual Income (hereinafter "GAI") benefit payments, which have been provided and continue to be provided in the same manner, pursuant to the terms and provisions of collective bargaining agreements entered into between counterclaim-defendant NYSA and International Longshoremen's Association, AFL-CIO (hereinafter "ILA"), to longshoremen and other waterfront workers licensed or registered under the provisions of the Waterfront Commission Act of New York and New Jersey (hereinafter referred to as "WCA"), N.Y. Unconsol. Laws §9801, *et seq.* (McKinney's 1974), by counterclaim-defendant NYSA-ILA GAI Fund, have not been and are not now subject to the assessments prescribed in WCA Part I, Article XIII, Section 3, N.Y. Unconsol. Laws §9858 (McKinney's 1974) (hereinafter referred to as the "Commission's Assessment"), and it is further

ORDERED, DECLARED, ADJUDGED AND DECREED, that vacation and holiday benefit payments, which have been provided and continue to be provided in the same manner, pursuant to the terms and provisions of collective bargaining agreements entered into between NYSA and ILA, to longshoremen and other waterfront workers licensed or registered under the provisions of the WCA, by counter-

claim-defendant NYSA-ILA Vacation and Holiday Fund, have not been and are not now subject to the Commission's Assessment, and it is further

ORDERED, DECLARED, ADJUDGED AND DECREED, (1) that the Commission has been and is now without legal authority to impose, levy, enforce or collect from any of the plaintiffs or counterclaim-defendants the Commission's Assessment upon GAI, vacation or holiday benefit payments heretofore or hereafter provided in the same manner pursuant to the terms and provisions of collective bargaining agreements entered into between NYSA and ILA by counterclaim-defendants NYSA-ILA GAI Fund and NYSA-ILA Vacation and Holiday Fund, to longshoremen or other waterfront workers licensed or registered under the provisions of the WCA; and, (2) that any action or effort by the Commission to impose, levy, enforce or collect from any of the plaintiffs or counterclaim-defendants the Commission's Assessment upon amounts, heretofore or hereafter paid in the same manner, pursuant to the terms and provisions of collective bargaining agreements entered into between NYSA and ILA, by counterclaim-defendants NYSA-ILA GAI Fund and NYSA-ILA Vacation and Holiday Fund, for GAI, vacation or holiday benefits to longshoremen or other waterfront workers licensed or registered under the provisions of WCA, has been and continues to be invalid, unauthorized and unlawful, and it is further

ORDERED, DECLARED, ADJUDGED AND DECREED, that any amounts paid by counterclaim-defendant NYSA within the six (6) year period prior to the service on October 20, 1978 of NYSA's counterclaim in this action, which represented the Commission's Assessment upon GAI, vacation

or holiday benefit payments provided, pursuant to the terms and provisions of collective bargaining agreements entered into between NYSA and ILA, by counterclaim-defendants, NYSA-ILA GAI Fund and NYSA-ILA Vacation and Holiday Fund to longshoremen or other waterfront workers licensed or registered under the provisions of the WCA, were invalidly, unlawfully and wrongfully collected by the Commission and shall be returned and refunded by the Commission to counterclaim-defendant NYSA with interest thereon at the rate of six percent (6%) per annum in accordance with the provisions of CPLR 5004, and it is thus further

ORDERED, ADJUDGED AND DECREED, that counterclaim-defendant NYSA, do recover of the defendant-counterclaim-plaintiff Waterfront Commission of New York Harbor the Sum of Three Million Three Hundred Thirty-Four Thousand Five Hundred Twenty-Eight and 14/100 ($3,334,528.14) Dollars, with interest thereon in the sum of ($728,541.96) Dollars, together with costs and disbursements in the sum of Seventy-Five ($75.00) Dollars, making in all the sum of ($4,063,145.10) Dollars, and that counterclaim-defendant NYSA have execution therefore against defendant-counterclaim-plaintiff Waterfront Commission of New York Harbor.

Enter,

/s/ XCR
J.S.C.

/s/ NORMAN GOODMAN
Clerk

FILED
MAR 12, 1980
NEW YORK
COUNTY CLERK'S OFFICE

APPENDIX F

Internal Revenue Service Private Ruling

Third Party Communications
Congressionals: 9/13/78,
11/20/78, 1/19/79,
2/6/79, 4/11/79

Index No. 3121.01-00
3306.02-00
3402.11-00

Internal Revenue Service
National Office Technical Advice Memorandum

30 MAY 1979

District Director
Manhattan

Taxpayer's Name:	New York Shipping Association, Inc.
Taxpayer's Address:	80 Broad Street New York, NY 10004
Taxpayer's Identification Number:	13-5637320
Years Involved:	1970—1973
Conference Held:	January 4, 1979

Issue:

The existing collective bargaining agreement provides, *inter alis,* [sic] for a guaranteed annual income fund (GAI) to furnish benefits to employees who are unable to work because of lack of work as longshoremen. The issue is whether these benefit payments are "wages" for purposes of the Federal Insurance Contributions Act (FICA) and

the Federal Unemployment Tax Act (FUTA) or whether they are supplemental unemployment benefit (SUB) payments which are *not* "wages" for the FICA and the FUTA.

Facts:

The New York Shipping Association, Inc. (the "Association") is a not-for-profit corporation, the principal members of which are the direct employers of longshore personnel in the port.

During the period from 1965 through mid 1972, the association administered the GAI program through a GAI Benefits Fund. Beginning officially as of October 14, 1971, the GAI program was transferred to joint labor-management control and the names of the program and trust were changed to reflect the joint control.

In a determination letter dated May 9, 1972, the Internal Revenue Service held the GAI Benefits Fund to be exempt from taxation under section 501(c)(17). This determination letter is still in effect and was reaffirmed, after an audit, in a letter dated February 28, 1979.

The GAI plan came into existence as a result of severe and extended unemployment problems caused by advanced industry technology, principally the adoption of containers and containerships to transport cargo. A Presidential panel studied the labor problems in the port and recommended a form of income continuation that would be supplemental to unemployment benefits.

The collective bargaining agreement which became effective October 1, 1965, provided for the establishment of a guaranteed annual income as a form of supplemental unemployment benefits. Originally, contributions to the

fund were similar to the assessments for the Vacation & Holiday Benefits Fund. In 1969, however, a combination hourly-tonnage assessment formula was adopted. Thus, the method of funding the plan's trust has always been different from the usual supplemental unemployment benefit plan. Also, the plan did not have the usual features of the auto and glass industries' SUB plans such as fixed contribution based on hours worked, credit units, short work week benefits, leveling week benefits and 85% to 95% of annual wage guarantee. The auto industry's SUB plans were primarily a response to seasonal layoffs, whereas this plan was in response to the introduction of new methods, namely, containerization.

In 1964 there were approximately 25,000 longshoremen covered by the plan. Today there is less than 11,000. The only "new" longshoremen since 1964 have been women hired after a court ordered that the jobs be made available to women. The average number of hours worked per longshoremen per year has dropped from approximately 3000 to 1200 hours.

Under the GAI plan all regular employees presently having active seniority status are guaranteed an annual income of 2,080 hours multiplied by the applicable basic straight-time rate. Although stated as an annual amount it is administered on a weekly basis. In order to be eligible for payments, the longshoremen must report each weekday (excluding holidays) to a hiring hall, where the men report daily to "shape up," which is a trade term used to mean that the men personally appear and evidence their availability for work as longshoremen by presenting a badge to "badge in" and "badge out." Employees "badge in" each workday between the hours of 6:00 a.m. and 7:30

a.m. and if work is not available to them, they "badge out" between 8:15 a.m. and 9:15 a.m.

The total amount of GAI a longshoreman is entitled to is reduced by gross earnings for days worked, vacation or holdiay pay, State unemployment benefits and earnings from full time outside employment. The Association provides local Unemployment offices with computer tape reports of employees' weekly activities, which include the employees' gross earnings, hours of work (by day), whether employees make themselves available for work, and any debit under the GAI plan.

Applicable Law:

Section 501(c)(17) of the Code provides for the exemption of trusts providing for the payment of supplemental unemployment compensation benefits.

Section 501(c)(17)(D) defines the term "supplemental unemployment compensation benefits" as benefits which are paid to an employee because of his involuntary separation from the employment of the employer (whether or not such separation is temporary) resulting from a reduction in force, the discontinuance of a plan or operation, or other similar conditions, and sick and accident benefits subordinate to those benefits.

Section 1.501(c)(17)-1(b)(3) provides that whether a "separation from the employment of the employer" occurs is a question to be decided with regard to all the facts and circumstances. The term "separation" includes both a temporary separation and a permanent severance of the employment relationship.

Section 1.501(c)(17)-1(b)(4) provides that involuntary separation directly resulting from "other similar condi-

tions" includes, for example, involuntary separation from the employment of the employer resulting from cyclical, seasonal, or technological causes.

Revenue Ruling 70-189, 1970-1 C.B. 134 describes a trust which provides partial compensation to employees for wages lost by employees as a result of a company's reduction in the hours each of its employees works each week. While the workers are not wholly separated from employment when they receive the short work week benefits, their employment situation has been changed in a way equivalent to a partial separation. Accordingly, the ruling concludes that the payments made by the trust will be treated as "supplemental unemployment compensation benefits" within the meaning of section 501(c)(17) of the Code.

Revenue Ruling 73-22 described a guaranteed annual income plan pursuant to which all eligible employees are guaranteed a minimum number of hours of employment per contract year multiplied by the then current straight-time hourly rate. Any gross earnings, vacation pay, paid holiday, and unemployment compensation received by the employee during the contract year are deducted from the guaranteed amount. In addition, a formula is provided to reduce the minimum number of hours by any time a union member fails to report for work when work is available. In order to be eligible for receipt of the guaranteed annual income, the employee must report for work and find no assignment available. The association pays the guaranteed amount on an annual basis, within a reasonable period after the close of the contract year. The ruling concludes that the guaranteed annual wage plan is not a supplemental unemployment compensation plan because the basic purpose of the plan is to provide the employee with a

guaranteeed annual salary, as in Revenue Ruling 61-68, 1961-1 C.B. 429.

Rationale:

The information indicates that as a result of the introduction of advanced containerization methods there has been a significant reduction in the number of employees and the total number of working hours each year among longshoremen in the port. Benefits are paid to compensate workers who have incurred a total or partial reduction in their working hours. Rev. Rul. 70-189 indicates that a partial reduction in working hours is equivalent to a partial separation from employment. The introduction of containerization methods, a technological change, constitutes a "similar condition" within the meaning of section 1.501(c)(17)-1(b)(4) of the regulations. Thus, the benefits paid by the Fund are paid to employees because of their involuntary separation from the employment of their employer resulting from a reduction in force, the discontinuance of a plan or operation, or other similar condition.

Conclusion:

The payments made by the GAI fund constitute supplemental unemployment benefits within the meaning of section 501(c)(17) and, therefore, are not wages for purposes of the FICA and the FUTA.

— End —

APPENDIX G

Notice of Appeal to the Supreme Court of the United States

COURT OF APPEALS
STATE OF NEW YORK

New York County Clerk's Index No. 11662/78

THE AMERICAN SUGAR REFINING COMPANY OF NEW YORK; ATLANTIC CONTAINER LINE (G.I.E.); DANIELS & KENNEDY, INC.; GLOBAL TERMINAL & CONTAINER SERVICES, INC.; HAMILTON MARINE CONTRACTING CO., INC.; HAMILTON TERMINAL CORPORATION; HELLENIC LINES LIMITED; FRANK J. HOLLERAN, INC.; HOWLAND HOOK MARINE TERMINAL OPERATING CO.; INTERNATIONAL TERMINAL OPERATING CO., INC.; LEDOUX CRANE CORP.; LEE & PALMER, INC.; LIPSETT STEEL PRODUCTS, INC.; JOHN W. MCGRATH CORPORATION; MAERSK CONTAINER SERVICE CO., INC.; MAHER TERMINAL INC.; R. MARTORELLA & CO., INC.; M.I. SPECIAL SERVICES CORP.; M.I. STEVEDORES, INC.; MOORE MCCORMACK LINES, INC.; NORTHEAST MARINE TERMINAL CO., INC.; NORTHEAST STEVEDORING CO., INC.; PITTSTON STEVEDORING CORP.; PROLERIZED SCHIABO-NEU COMPANY; QUIN MARINE SERVICES, INC.; SEA-LAND SERVICE, INC.; TEMCO SERVICE INDUSTRIES, INC.; UNITED TERMINALS INC.; UNIVERSAL MARITIME SERVICE CORP.; and UNION MINERALS & ALLOYS CORP.,

Plaintiffs-Respondents,

—against—

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Defendant-Appellant.

Appendix G—Notice of Appeal to the Supreme Court of the United States

by original summons and between the said

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Counterclaim-Plaintiff-Appellant,

—against—

NYSA-ILA VACATION AND HOLIDAY FUND, NYSA-ILA GAI FUND, THOMAS W. GLEASON, SR., JOHN BOWERS, VINCENT COLUCCI, CAROL GARDNER, WILLIAM P. LYNCH, WILLIAM MURPHY, ANTHONY SCOTTO, WALTER L. SULLIVAN, ANTHONY ANASTASIO, JAMES J. DICKMAN, ROBERT F. CHIARELLO, JAMES G. COSTELLO, C.H.C. EVERHARD, JOHN J. FARRELL, JR., DAGFINN GUNNARSHAUG, MICHAEL E. MAHER, JOSEPH F. MCGOLDRICK, FRANCIS X. MCQUADE, DONALD J. SCHMIDT, individually and as Trustees of the NYSA-ILA GAI FUND, and NEW YORK SHIPPING ASSOCIATION, INC.,

Counterclaim-Defendants-Respondents.

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Appellants New York Shipping Association, Inc., NYSA-ILA GAI Fund and NYSA-ILA Vacation and Holiday Fund hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, entered in this action on February 11, 1982, reversing the judgment of the Supreme Court of the State of New York, Appellate Division, First Department which affirmed the

judgment of the Supreme Court of the State of New York, New York County granting summary judgment in favor of Plaintiffs-Respondents and Counterclaim-Defendants-Respondents.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: New York, New York
April 16, 1982

LAMBOS, FLYNN, NYLAND & GIARDINO

BY /s/ DONATO CARUSO
29 Broadway, 9th Floor
New York, N.Y. 10006
Attorneys for Appellant New York Shipping Association, Inc.

THOMAS W. GLEASON

BY /s/ ERNEST L. MATHEWS, JR.
One State Street Plaza
New York, New York 10004
Attorneys for Appellants NYSA-ILA GAI Fund and NYSA-ILA Vacation and Holiday Fund

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COURT OF APPEALS

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'82 APR 22 PM 2:01
NEW YORK COUNTY

Appendix G—Notice of Appeal to the Supreme Court of the United States

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

WILLIAM M. SPELMAN, being duly sworn, deposes and says that on April 16, 1982, he served the foregoing Notice of Appeal on the Waterfront Commission of New York Harbor by depositing a true copy of the Notice of Appeal in a postpaid, properly addressed envelope in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, addressed to Gerald P. Lally, Esq., General Counsel, Waterfront Commission of New York Harbor, 42 Broadway, New York, New York 10004; Shirley Adelson Siegel, Solicitor General, Robert Abrams, Attorney General of the State of New York, The Capital, Albany, New York 12224; William Harla, Esq., James R. Zazzali, Attorney General of New Jersey, State House Annex, Trenton, New Jersey 08625.

/s/ WILLIAM M. SPELMAN
WILLIAM M. SPELMAN

Sworn to before me this
16th day of April, 1982

/s/ JOHN A. DRENNAN
Notary Public

JOHN A. DRENNAN
Notary Public, State of New York
No. 24-6098650 Qual. in Kings Co.
Term Expires March 30, 1984

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
JUN 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2062

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NEW YORK SHIPPING ASSOCIATION, INC., NYSA-ILA GAI FUND, and NYSA-ILA VACATION AND HOLIDAY FUND,

Appellants,

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

IRVING MALCHMAN
475 Park Avenue South
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(212) 683-8650
Attorney for Appellee
Waterfront Commission of New York Harbor

Of Counsel:

JEROME J. KLIED
Deputy Executive Director

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DAVID B. GREENFIELD
Assistant Counsel

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28 U.S.C. § 1257(2) 1, 2, 3, 5

No. 81-2062

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NEW YORK SHIPPING ASSOCIATION, INC., NYSA-ILA GAI FUND, and NYSA-ILA VACATION AND HOLIDAY FUND,

Appellants,

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

The Waterfront Commission of New York Harbor, the appellee herein, moves, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, to dismiss the appeal herein, take pursuant to 28 U.S.C. § 1257(2), upon the grounds that the statute in question (an interstate compact approved by Congress), is not a state statute within the meaning of Section 1257(2); that the constitutional questions sought to be reviewed were not properly raised below; and that, in any event, the purported constitutional questions are unsubstantial.

Statement

This is an attempted appeal from a judgment and opinion of the Court of Appeals of the State of New York

holding that the vacation and holiday payments and the guaranteed annual income payments to longshoremen in this case are subject to assessment by the Commission as being, within the meaning of Article XIII, Section 3, of the Waterfront Commision Compact (N.Y. McK. Unconsol. Laws 9858; N.J.S.A. 32:23-58), part of the "gross payroll payments" paid by the "employers" of longshoremen for "work or labor performed". The Court of Appeals further held that appellant NYSA-ILA Vacation and Holiday Fund (which makes the vacation and holiday paymentsc to longshoremen) and appellant NYSA-ILA GAI Fund (which makes the guaranteed annual income payments to longshoremen) are "employers" within the meaning of the assessment provisions (said Article XIII, Section 3) of the Compact.

The assessment provisions of the Compact (Article XIII, Section 3) and the judgment and opinion of the Court of Appeals are set forth at pp. 3-4 and Appendix A, respectively, of the Jurisdictional Statement.

Reasons for Dismissing the Appeal

I.

The Waterfront Commission Compact (which is an interstate compact affirmed by Congress) is not a state statute within the meaning of 28 U.S.C. § 1257(2).

This purported appeal challenges the constitutional validity of the interpretation by the court below of the assessment provisions of the Compact, which is an interstate compact between the states of New York and New Jersey duly approved by Congress (Act of August 12, 1953, 67 Stat. 541, c. 407). See *DeVeau* v. *Braisted*, 363 U.S. 144, 147-151 (1960).

It is established that Congressional consent operates to "transform interstate compacts into federal law." *Cuyler*

v. *Adams*, 449 U.S. 433, 101 S. Ct. 703, 707, n.7 (1981). It accordingly follows that the Compact, which has been transformed into federal law by Congressional consent, is not a state statute within the meaning of 28 U.S.C. § 1257(2), pursuant to which appellants purportedly appeal to this Court.

II.

Appellants never challenged in the court below the constitutional validity of the assessment provisions of the Compact, as applied, but instead claimed only that the Commission's assessments were precluded or preempted by federal law. In any event, appellants preemption claim is unsubstantial.

This Court does not have jurisdiction to entertain appellants' preemption claim upon appeal pursuant to 28 U.S.C. 1257(2) unless appellants challenged the validity of the assessment provisions of the Compact, as applied, upon the ground of repugnancy to laws of the United States. It is insufficient for appellants merely to have asserted in this case that the Commission's assessments were preempted by or conflict with federal law. *Wilson* v. *Cook*, 327 U.S. 474, 482 (1946); *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U.S. 182, 185-186 (1945). Cf. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 2820, n. 4 (1980).

In its brief below (App. I, *infra*), the NYSA (the only appellant to have argued the preemption claim) contended (in the point heading) that "The Commission's Tax Is An Invalid State Imposition Preempted by Paramount Federal Law" (App. I at 1a) and, again (in a subpoint heading) that, "The Commission's Tax Is Preempted By Federal Law" (App. I at 2a). Hence, appellants' preemption claim was addressed to the Commission's "tax", and not to the validity of the assessment provisions of the Compact, as applied.

Accordingly, the conclusions of the court below in respect of appellants' preemption claim was not that the assessment provisions of the Compact were constitutionally valid, as applied, but rather: "We conclude that payments from both Funds are within the commission's power of assessment under the Compact." (Jurisdictional Statement, App. A at 20a).

Even now in the Jurisdictional Statement, appellants do not attack the validity of the assessment provisions of the Compact, as applied. Instead, appellants state, e.g., that (p. 7), "This case grew out of the Waterfront Commission's attempt to assess GAI and V&H benefits."

In any event, appellants' preemption claim is unsubstantial.

Appellants' never clearly identify the specific federal statue or law that the assessment provisions of the Compact are purportedly in conflict with. That aside, the conclusive answer to appellants' claim of federal preemption is that Congress has consented to the Compact (including its provisions relating to assessments). For example, in sustaining the constitutionality of Section 8 of the Waterfront Commission Act, which prohibits the collection of dues for waterfront unions having criminals as officers or employees and which has the legal status of an independent state statute since it is not part of the Compact, this Court in *DeVeau* v. *Braisted, supra,* relied upon the fact that Congress was mindful that Section 8 is part of the Waterfront Commission Act (which includes the Compact as Part I). This Court concluded from this that Congress in approving the Compact had demonstrated its intent, even though Section 8 is not formally part of the Compact, that Section 8 should stand despite the provision of National Labor Relations Act granting employees the right to bargain collectively through representatives of their own choice. In *DeVeau,* this Court said, "Had § 8 been written into the Compact, even the most subtle

casuistry could not conjure up a claim of pre-emption" (363 U.S., at p. 153).

See also *International Longshoremen's Association* v. *Waterfront Commission of New York Harbor*, 642 F.2d 666 (2d Cir. 1981), *cert. denied*, —— U.S. ——, 102 S. Ct. 509 (1981); *New York Shipping Assn.* v. *Waterfront Commission of New York Harbor*, Civ. No. 78-995 (D.N.J. 1978), *aff'd* 582 F.2d 1275 (3rd Cir. 1978), *cert. denied* 439 U.S. 1071 (1979) [Appendix II hereto].

Since the assessment provisions are part of the Compact itself, "even the most subtle casuistry could not conjure up a claim of pre-emption." Indeed, in this very case, the court below in its opinion referred to Congressional discussions of the assessment provisions of the Compact. (Jurisdictional Statement, App. A at 14a).

III.

Appellants never contended in the court below that the assessment provisions of the compact, as applied, violated due process. In any event, appellants' due process claim is unsubstantial.

Appellants never made an argument of any kind in the court below based upon due process. That explains why there is not even a reference to the question of due process in the opinion rendered by the court below. Plainly, appellants cannot, consistent with 28 U.S.C. § 1257(2), now make a due process argument for the first time in this Court.

The point is, in any event, without substance. Appellant's basic greviance is their claim that the interpretation of the assessment provisions of the Compact by the court below is erroneous. Putting aside its correctness or incorrectness, there is nothing in the result reached below that can possibly be deemed to be violative of substantive due process.

Appellants sole point in respect of the substantive due process claim is that the decision below is not only wrong but very wrong. However—short of total irrationality—an erroneous interpretation of a statute by a court does not offend substantive due process simply because it is erroneous. *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U.S. 157 (1917).

CONCLUSION

For the foregoing reasons, it is respectively submitted that the appeal herein should be dismissed or certiorari should be denied.

Dated: New York, New York
June 3, 1982

Respectfully submitted,

IRVING MALCHMAN
475 Park Avenue South
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(212) 683-8650
Attorney for Appellee
Waterfront Commission of New York Harbor

Of Counsel:

JEROME J. KLIED
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GERALD P. LALLY
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DAVID B. GREENFIELD
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Appendix

Appendix I—Excerpt from Brief of Appellant New York Shipping Association, Inc.

POINT II

The Commission's tax impermissibly conflicts with (1) the Government's ruling that GAI benefits are not wages, but sub benefits, and (2) the Federal tax exemptions granted to the GAI and V&H programs. Thus, the Commission's tax is an invalid state imposition preempted by paramount Federal Law.

A. The IRS Ruling That GAI Payments Are SUB Benefits And Not Wages

The National Office of the Internal Revenue Service has specifically and decisively ruled that GAI benefits:

> constitute supplemental unemployment benefits within the meaning of section 501 (c) (17) and, therefore, are not wages for purposes of the FICA and the FUTA.

(R 580). That ruling was based on Code § 501(c) (17) (D), 26 U.S.C. § 501(c) (17) (D), which defines SUB benefits to be amounts

> paid to an employee because of his involuntary separation from the employment of the employer (whether or not such separation is temporary) resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions.

The term "other similar conditions" includes involuntary separation from employment resulting from technological causes. Treas. Reg. § 1.501(c) (17)-1(b) (4) (1968).

The Internal Revenue Service considered the nature and fundamental purpose of GAI benefits and found that they

constitute SUB benefits. This finding leads naturally and properly to the conclusion that GAI benefits are not "wages" subject to FICA or FUTA taxes—taxes, which are substantially similar to the Commission's payroll tax. *See* Rev. Rul. 77-347, 1977-2 C.B. 362.

B. The Federal Tax Exemptions of The V&H And GAI Programs

After reviewing the activities and records of the V & H Fund, the Internal Revenue Service has confirmed over the years that:

> your Federal tax-exempt status continues under Section 501(c) (9) of the Internal Revenue Code.

(R 439; *see also* R 436-38). Similar rulings have been issued with respect to the GAI Fund's tax exempt status under Code § 501(c) (17) (R 413-14).

Equally significant is the fact that the V & H Fund was also advised by the Internal Revenue Service that:

> payments made to the Waterfront Commission of New York by the...Fund is not permissible under Section 501(c) (9). If such activities should reoccur, your exempt status could be in jeopardy.

(R 439).

C. The Commission's Tax Is Preempted By Federal Law

The Supreme Court has established a firm doctrine that paramount federal law preempts state regulation of either the collective bargaining process or the terms of the labor agreement. *Lodge 76, International Ass'n of Machinists and Aerospace Wkrs.* v. *Wisconsin Employment Relations Comm'n,* 427 U.S. 132 (1976); *Amalgamated Transit U., Div. 819* v. *Byrne,* 568 F.2d 1025 (3d Cir. 1977) (*en banc*); *General Electric Co.* v. *Callahan,* 294 F.2d 60 (1st Cir.

1961), *petition for cert. dismissed*, 369 U.S. 832 (1962).[31] This preclusion of state regulation is premised upon the fundamental tenet of national labor policy which mandates a regime of government non-interference in the collective bargaining process. *Lodge 76*, 427 U.S. at 153; *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 288 (1972); *NLRB* v. *Insurance Agents Interational Union*, 361 U.S. 477, 489-90 (1960).

To achieve this policy goal, Congress set forth in the Internal Revenue Code a well defined system of exemptions to shield from taxation fringe benefit programs that are the direct result of collective bargaining. It is undisputed that both the GAI and V&H Programs are products of collective bargaining between the shipping industry and the longshore union. Both programs, under applicable congressional enactments, enjoy the benefits of the federal scheme of tax exemption.[32]

State interference with this federal scheme is preempted when the federal interest is so dominant that the

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[31] Federal labor law preemption is predicated upon the pervasive Congressional regulation and occupation of the area of labor relations "to the full extent of its constitutional power under the Commerce Clause." *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 391 (1951). Congress' purpose in enacting federal labor legislation was to assure "uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies." *Garner* v. *Teamsters Local 776*, 346 U.S. 485, 490 (1953). The preemption doctrine precludes any state law of general applicability, decisional or statutory, substantive or procedural, which is invoked to regulate activities that are governed by federal law. *Farmer* v. *Carpenters Local 25*, 430 U.S. 290, 300 (1977).

[32] New York State has adopted an identical exemption policy. *See* N.Y. Tax Law § 601(d) (McKinney Supp. 1980). The GAI Program, in addition to its exemption from federal FICA and FUTA taxes, is also exempt from state unemployment taxes.

> federal system will be assumed to preclude enforcement of state laws on the same subject . . . or the state policy may produce a result inconsistent with the objective of the federal statute.

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Hill* v. *Florida ex rel. Watson*, 325 U.S. 538 (1945).[33]

The impostion of the Commission's tax upon GAI and V&H benefits would upset the congressionally mandated and judicially confirmed federal policy of national uniformity in the regulation of collectively bargained agreements and fringe benefit programs. The Commission's disruptive tax assessments upon these collectively bargained and federal tax exempt fringe benefit funds impermissibly conflicts with the federal scheme of a uniform tax exemption for GAI, V&H and other fringe benefits. Indeed, the Internal Revenue Service has specifically warned that the payment by the V&H Fund of the Commission's tax is prohibited by federal tax law (R 439). Accordingly, the Commission's tax upon GAI and V&H benefits is foreclosed by the doctrine of federal preemption and should be declared invalid.

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[33] It is well settled that the Act, although part of a congressionally approved compact, is not a law of the United States for federal preemption purposes. *DeVeau* v. *Braisted*, 363 U.S. 144 (1960); *Int'l Longshoremen's Ass'n* v. *Waterfront Comm'n of N.Y. Harbor*, 495 F. Supp. 1101, 1111, 1120-34 (S.D.N.Y. 1980); *rev'd on other grounds*, 642 F.2d 666 (2d Cir. 1981); *Bell* v. *Waterfront Comm'n of N.Y. Harbor*, 279 F.2d 853, 855 (2d Cir. 1960); *Rivoli Trucking Corp.* v. *American Export Lines, Inc.*, 167 F. Supp. 937, 939 (E.D.N.Y. 1958); *Linehan* v. *Waterfront Comm'n of N.Y. Harbor*, 116 F. Supp. 401 (S.D.N.Y. 1953), *aff'd*, 347 U.S. 439 (1954); *cf. Ciccone* v. *Waterfront Comm'n of N.Y. Harbor*, 438 F. Supp. 55, 58 (S.D.N.Y. 1977). Thus, it is no different than any other state law which must yield to the provisions of paramount federal law under the doctrine of federal preemption.

Appendix II—Unreported opinion of United States District Court for the District of New Jersey—*New York Shipping Association et al. v. Waterfront Commission.*

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 78-995

OPINION

NEW YORK SHIPPING ASSOCIATION, INC., and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Plaintiffs,

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,
Defendant.

Appearances:

Irwin Herschlag, Esq.
and
Messrs. Lorenz, Finn, Giardino & Lambos
(New York Bar)
By: C. Peter Lambos, Esq.
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Attorneys for Plaintiff New York Shipping Association, Inc.

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Gerald P. Lally, Esq.
General Counsel for Defendant
and
Irving Malchman, Esq.
Director of Litigation and Research for Defendant

Appendix II

MEANOR, District Judge.

This matter originally came before the court upon plaintiffs' application for preliminary injunction returnable May 22, 1978. Thereafter, defendant filed a motion for summary judgment, which was followed by plaintiffs' cross-motion for summary judgment. The entire controversy was then adjourned until May 26, 1978. At the oral argument both sides agreed that there were no issues of fact and that the matter was ripe for decision as a matter of law.

Plaintiffs are the New York Shipping Association, Inc. (N.Y.S.A.) and the International Longshoremen's Association, AFL-CIO (I.L.A.). Defendant is the Waterfront Commission of New York Harbor (Commission). The gist of the complaint asserts violations of the Labor Management Relations Act (29 U.S.C. § 141 *et seq.*), invoking jurisdiction under 28 U.S.C. §§ 1337 and 2201; 29 U.S.C. § 185, and venue pursuant to 28 U.S.C. § 1391.

HISTORICAL BACKGROUND

During the first half of this century, a number of public investigative bodies issued reports which exposed the many and chronic evils existing on the waterfront in the port of New York.[1] In response to these public exposures and for the purpose of eliminating corruption, racketeering, loansharking and various other evils then in existence on the waterfront, the joint legislatures of New York and New Jersey enacted the Waterfront Commission Act in 1953.[2] Subsequently, Part I of the Act, representing an interstate compact between the statutes of New York and New Jersey, was submitted to and approved by Congress.[3]

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[1] Page 7, defendant's principal brief.

[2] N.Y. Laws, 1953, C. 882 (McK. Unconsol. Laws § 6700aa *et seq.*); N.J. Laws, 1953, C. 202 (R.S. 32:33-1 *et seq.*).

[3] Act of August 12, 1953, c. 407, 67 Stat. 541.

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The Waterfront Commission compact encompasses a series of remedial measures designed to eliminate the waterfront evils that had been publicly exposed over prior decades. The most important of these measures was the creation of a bi-state regulatory body, the Waterfront Commission of New York Harbor. Prior to the creation of the Commission, the one evil most often cited as the primary source of favoritism, kickbacks and other undesirable conditions was the vast oversupply of labor existing on the waterfront. Thus, *inter alia*, the Commission was empowered to maintain a register for longshoremen and checkers;[4] to open or close admissions to the register, thereby regulating the size of the waterfront labor force;[5] to exclude from the register those persons with an undesirable criminal background;[6] and to remove from the work force those persons who do not apply regularly for work in compliance with such standards as may be established by the Commission.[7] The power given to the Commission has as one of its primary goals the regulation of the size of the waterfront labor force for the purpose of stablizing the employment of workers through the prevention of an excess number of employees on the register.

THE INSTANT CONTROVERSY

The instant controversy arises out of a chronic "checker shortage" existing in the Harbor. In past attempts to alleviate similar checker shortage problems, plaintiffs

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[4] § 5-P; Mck. Unconsol. Laws 9906; N.J.S.A. 32:23-114.

[5] *Id.*

[6] McK. Unconsol. Laws 9841; N.J.S.A. 32:23-41. Also see, Mck. Unconsol. Laws 9844; N.J.S.A. 32:23-44.

[7] McK. Unconsol. Laws 9834 to 9837; N.J.S.A. 32:23-24 to 32:23-38.

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N.Y.S.A. and I.L.A. had negotiated collective bargaining agreements which provided for the temporary transfer of employees in the longshoremen category into the checker category. These collective bargaining agreements, which enabled plaintiffs N.Y.S.A. and I.L.A. to determine which employees would fill the vacant checker slots, were approved by the Commission. In response to the current checker shortage, plaintiffs' attempted solution was to maintain the current number of employees in the longshoremen category, and to bring in new employees from the outside to fill the checker rosters. The Commission, however, had determined that an excess of longshoremen currently existed in the register and therefore refused to accept the solution proposed by plaintiffs. Instead, the Commission issued its own solution to the checker shortage, hereinafter referred to as Determination 15.

Determination 15 proposes the voluntary transfer of 200 employees currently included on the longshoremen's register into the checker category. The Commission's proposal would give a preference to those employees who due to physical disability are unable to perform more strenuous labor as longshoremen. The Commission has determined that a transfer of these longshoremen into checker status would achieve three goals which are consistent with the meaning and purpose of the Act; first, it would provide the manpower necessary to eliminate the checker shortage; second, it would eliminate some of the excess number of employees on the longshoremen's register; and, finally, it would result in an enormous savings to the entire New York Harbor network. Plaintiffs, however, assert that Determination 15 interferes with their federally guaranteed ability to engage in private collective bargaining, claiming that it is their sole province "to establish through collective bargaining the seniority hiring procedures, hiring priori-

ties and other terms and conditions of employment of waterfront workers within their bargaining unit." Plaintiffs choose not to seek judicial review of this matter in the state courts as is provided for in § 5-P of the compact[8] but instead came to this court seeking to enjoin the implementation of Determination 15.

Essential to the resolution of this case is the determination of the following issues (*continued page 12a*):

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32:23-114. Suspension or acceptance of applications for Inclusion in longshoremen's register; determination; standards

The commission shall suspend the acceptance of application for inclusion in the longshoremen's register for a period of 60 days after the effective date of this act. Upon the termination of such 60 day period the commission shall thereafter have the power to make determinations to suspend the acceptance of application for inclusion in the longshoremen's register for such periods of time as the commission may from time to time establish and, after any such period of suspension, the commission shall have the power to make determinations to accept applications, which shall be processed in the order in which they are filed with the commission, for such period of time as the commission may establish or in such number as the commission may determine, or both. Such determinations to suspend or accept applications shall be made by the commission on its own initiative or upon the joint recommendation in writing of stevedores and other employers of longshoremen in the Port of New York District, acting through their representative for the purposes of collective bargaining with a labor organization representing such longshoremen in such

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[8] § 5-P of the compact, referred to herein as N.J.S.A. 32:23-114, is fully reproduced on page 4a of this opinion.

district and such labor organization, which joint recommendation the commission shall have the power to accept or reject.

2. In administering the provisions of this section, the commission shall observe the following standards:

(a) To encourage as far as practicable the regularization of the employment of longshoremen;

(b) To bring the number of eligible longshoremen into balance with the demand for longshoremen's services within the Port of New York District without reducing the number of eligible longshoremen below that necessary to meet the requirements of longshoremen in the Port of New York District;

(c) To encourage the mobility and full utilization of the existing work force of longshoremen;

(d) To protect the job security of the existing work force of longshoremen;

(e) To eliminate oppressive and evil hiring practices injurious to waterfront labor and waterborne commerce in the Port of New York District, including, but not limited to, those oppressive and evil hiring practices that may result from either a surplus or shortage of waterfront labor;

(f) To consider the effect of technological change and automation and such other economic data and facts as are relevant to a proper determination.

In observing the foregoing standards and before determining to suspend or accept applications for inclusion in the longshoremen's register, the commission shall consult with and consider the views of, including any statistical data or other factual information concerning the size of the longshoremen's register submitted by, carriers of

freight by water, stevedores, waterfront terminal owners and operators, any labor organization representing employees registered by the commission, and any other person whose interests may be affected by the size of the longshoremen's register.

3. Any determination by the commission pursuant to this section to suspend or accept applications for inclusion in the longshoremen's register shall be made upon a record, shall not become effective until 5 days after notice thereof to the collective bargaining representative of stevedores and other employers of longshoremen in the Port of New York District and to the labor organization representing such longshoremen and shall be subject to judicial review for being arbitrary, capricious, and an abuse of discretion in a proceeding jointly instituted by such representative and such labor organization. Such judicial review proceeding may be instituted in either State in the manner provided by the law of such State for review of the final decision or action of administrative agencies of such State, provided, however, that such proceeding shall be decided directly by the appellate division as the court of first instance (to whch the proceeding shall be transferred by order of transfer by the Supreme Court in the State of New York or in the State of New Jersey by notice of appeal from the commission's determination) and provided further that notwithstanding any other provision of law in either State no court shall have power to stay the commission's determination prior to final judicial decision for more than 15 days. In the event that the court enters a final order setting aside the determination by the commission to accept applications for inclusion in the longshoremen's register, the registration of any longshoremen included in the longshoremen's register as a result of such determination by the commission shall be cancelled.

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This section shall apply, notwithstanding any other provision of this act, provided, however, such section shall not in any way limit or restrict the provision of section 5 of article IX of this act[1] empowering the commission to register longshoremen on a temporary basis to meet special or emergency needs or the provisions of section 1 of article IX of this act[2] relating to the immediate reinstatement of persons removed from the longshoremen's register pursuant to article IX of this act.[3] Nothing in this section shall be construed to modify, limit or restrict in any way any of the rights protected by article 15 of this act[4] L. 1966, c. 15, § 2, supplementing L. 1953, c. 202.

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(*continued from page 9a*)

I. whether the instant controversy presents an appropriate occasion for this court to decline to exercise its discretion, and thereby invoke the doctrine of Abstention, thus deferring resolution of the within issues to an appropriate state tribunal;

II. whether the Commission in promulgating Determination 15 acted beyond the power delegated to it by the statutes of New York and New Jersey enacted for the purpose of implementing the compact; and

III. whether the Commission's Determination 15, if authorized by the Waterfront Commission Act, is in direct conflict with plaintiffs federally protected collective bargaining rights, thereby invoking its preemption under federal labor law.

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[1] Section 32:23-38.

[2] Section 32:23-37.

[3] Sections 32:23-34 to 32:23-38.

[4] Sections 32:23-68, 32:23-69.

Appendix II

I

In asking this court to abstain, defendant relies upon *Railroad Commission of Texas* v. *Pullman*, 312 U.S. 496 (1940) and related cases. The *Pullman* line of cases encourages federal courts to abstain from exercising jurisdiction in cases where such jurisdiction would otherwise be proper, if a substantial question arises about the interpretation of a state law and the state court is an entirely more appropriate forum to resolve the conflict. *Pullman, supra; Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Pub. Serv. Com.* v. *Sourthern R. Co.*, 341 U.S. 341 (1951).

However, abstention is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. A federal court is not required to exercise its judicial discretion to dismiss a suit on abstention grounds merely because a state court *could* entertain it. *Colorado River Water Cons. Dist.* v. U.S. 424 U.S. 800, 47 L.Ed.2d 483 (1976). Abstention will be appropriate where there have been presented significant and difficult questions of state law bearing on policy problems of substantial public import. *Louisiana Power & Light* v. *City of Thibodaux*, 360 U.S. 25 (1959). Thus, if review of those questions by a federal court would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern, the federal court should abstain. *Burford, supra; Colorado River Water, supra.* However, an additional consideration cited for reserving abstention only to extraordinary circumstances is the undue expense and delay which has been referred to as "an unnecessary price to pay for our federalism." *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 11 L.Ed.2d 440 (1964). Thus, special circumstances must exist to justify absten-

tion because "abstention operates to require piecemeal adjudication in many courts...thereby delaying ultimate adjudication on the merits for an undue length of time." *Baggett* v. *Bullitt*, 377 U.S. 360, 12 L.Ed.2d 377 (1964).

In this case the special circumstances requireed to support abstention are not present. This controversy does not require this court to resolve significant or difficult issues of state law which involve matters of purely local concern. *Louisiana Power & Light, supra.*

There is no contention that the state statute involved is unclear or ambiguous—rather the issue is whether certain action taken by the Commission was *authorized* by the statute. The state legislative and congressional intent regarding the Act are clearly ascertainable from the record before this court. There is no allegation that an ongoing state proceeding is considering the same issues. In addition, the issues presented herein are not ones of purely local concern. This fact is made clear by an express direction of Congress, which, in giving its stamp of approval to the Act and the compact, recognized the impact which matters relating to the New York Harbor have on commerce and the nation as a whole.

Finally, abstention must be rejected because of the inherent delay occasioned by its exercise. The present record shows the emergent nature of the checker shortage and the possibility it might lead to labor unrest at the waterfront. It is clear that a disruption of labor at the Harbor would havee severe economic effects. Invocation of abstention and delaying resolution of this controversy until such time as a state court could entertain it would no doubt worsen the present checker shortage and might precipitate labor unrest.

Thus, since there exist no special circumstances which would *compel* abstention, I will exercise my discretion to entertain the merits at this time.

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II

In ascertaining the validity of Determination 15, this court cannot ignore the purpose behind the Act and the Waterfront Commission itself. This legislation is primarily oriented toward the elimination of racketeering, kickbacks and various other forms of corruption which had been exposed by the investigations of prior decades. In vesting the Commission with the power to control and shape the size of the labor force, the joint state legislatures, as approved by Congress, obviously felt that the various evils which had previously thrived on the vast oversupply of longshoremen could be eliminated. The brief and affidavits submitted by the Commission stress that the action embodied in their Determination 15 will provide a great economic savings to the New York Harbor. In a hearing conducted by the Commission, both employees and employers alike testified as to the economic utility of resolving the checker shortage by transferring employees currently on the longshoremen's register, rather than introducing new workers from outside.

There are two groups of longshoremen who are currently idle and are frequently an unutilized element of the Harbor labor force. One group consists of employees with physicial disabilities which render them unable to perform the arduous work required of a longshoreman. The second group consists of able longshoremen who, due to their advanced seniority status, are not required to assume the most strenuous longshoremen's duties and, therefore, frequently are not utilized. An individual in either group, however, continues to receive a guaranteed annual income (G.A.I.) of approximately $15,000 when he is not working. Clearly then, a transfer of some 200 longshoremen from the foregoing groups would not only alleviate the checker shortage but terminate G.A.I. benefits that would result,

it is said, in a net savings to the industry of approximately $3 million annually. Finally, the Commission argues, in addition to increasing efficiency by solving the checker shortage and creating a vehicle for Harbor-wide savings, Determination 15 fosters the statutory purpose of regulating the size of the longshoremen's register.

Plaintiffs, however, base their argument that Determination 15 is "*ultra vires*" on the fact that N.J.S.A. 32:23-114 (§ 5-P of the Waterfront Commission Compact), under which the Commission promulgated Determination 15, does not expressly give the Commission authority to either transfer workers from one category to another, or to create a transfer preference in favor of disabled longshoemen. However, it is apparent that § 5-P also does not expressly withhold such authority. Plaintiffs are correct in asserting that § 5-P only expressly enables the Commission to open or close the register to new applicants in order to regulate the size of the Harbor labor force. However, § 5-P also specifically compels the Commission to "encourage the mobility and full utilization of the existing work force of longshoremen."[9]

It is clear that the checker shortage is not a new problem. Nor is a transfer of longshoremen to checker status a new solution to that problem. In the past, in response to identical shortages, plaintiffs approved transfers of longshoremen into checker status. Now, plaintiffs oppose Determination 15, not because they claim that transfer is any less viable a solution now that it was in the past but because it interferes with plaintiffs' exclusive right "to establish through collective bargaining the seniority hiring procedures, hiring priorities and other terms and condi-

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[9] N.J.S.A. 32:23-114(2)(c).

tions of employment of waterfront workers within their bargaining unit."

There can be no question but that the Act, as approved by Congress, has as its major thrust the "cleaning-up" and maintenance of the waterfront so as to eliminate the problems of the past. To this end, the Commission has been granted the exclusive authority to control and regulate the size of the labor force therein. Determination 15 is clearly consistent with and in furtherance of that objective. Defendant Commission, in an attempt to "encourage the mobility and full utilization of the existing work force of longshoremen" has resolved to fill the checker shortage by reduction of the excessive longshoremen's register. As stated, Determination 15 provides for the voluntary transfer of 200 longshoremen into the checker category. In addition, preference is to be given to the registration of disabled longshoremen as checkers. This solution is not only economical and practical but is consistent with the objectives of the Act.

Despite the claim that Determination 15 violates the compact because it creates a new order of priority in registration, it is clear that Determination 15 is not inconsistent with §5-P of the compact. The Commission's solution does not interfere with the plaintiffs' ability to determine the seniority status of the transferred workers. Nor does it create a new *hiring* priority which the employers must follow in selecting employees. Once workers have been transferred into the checker register, the unions are free to negotiate and establish whatever seniority provisions they wish. And employers are still compelled to hire from the register based upon the collectively bargained priority and seniority provisions. Determinations 15 merely regulates the size of the longshoremen's registers and increases the number of workers available

for duty as checkers. The fact that the Commission has created new categories for the registration of checkers does not render Determination 15 *ultra vires*. Both the voluntary transefer of 200 longshoremen—and the stated registration preference for disabled workers—are reasonable, practical and economical solutions that are entirely consistent with the purposes and policies of the Act. Determination 15 suggests a solution which would provide an enormous overall financial benefit to the entire Harbor. Employers would save large quantities of money—and the overall efficiency of the Port would increase. If, as plaintiffs contend, Determination 15 creates a shortage of longshoremen in a certain labor category, the Commission is empowered, pursuant to § 5-P, to open up the register to fill that shortage.

Congress put its stamp of approval on the policy behind controlling the waterfront problems when it adopted the Act. While it is true that § 5-P was not part of the original Act as approved by Congress, there is no question but that Congress intended to invest the Commission with broad power to effectuate the statutory purposes and legislative intent. Thus, "in giving its approval to the compact Congress explicitly gave its authority to such supplementary legislation in accord with the objectives of the compact by providing in the clause granting consent '[t]hat the consent of Congress is hereby given to the compact set forth . . . and to the carrying out and effectuation of said compact, and enactments in furtherance thereof.'" *DeVeau* v. *Braisted*, 363 U.S. 144, 4 L.Ed. 2d 1109, 1115 (1960). Clearly, Determination 15 is "such supplementary legislation" designed to effectuate and carry out the mandates of the compact. The fact that the *methods* employed by the Commission in so effectuating the compact are not specifically authorized by § 5-P does not render Determination 15 outside the scope of authority granted by the Act. *DeVeau, supra.*

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III

If the Waterfront Commission Act were purely a creature of bi-state law, the doctrine of preemption would be applicable to remedy any existing conflicts between it and federal labor law. State attempts to influence the substantive terms of collective-bargaining agreements may conflict with federal labor law. *Lodge 76, etc.* v. *Wisconsin Emp. Rel. Com.*, 427 U.S. 132 (1976). It is recognized that matters of seniority classification, hiring priorities and employee transfers from section to section, are commonly matters subject to collective bargaining and generally within the exclusive province of employers and unions. Thus, where a state law empowers a state commission to intrude into areas normally reserved to collective bargaining, federal preemption might bar such state action whenever it directly infringes upon rights guaranteed by the federal Labor Act. *Lodge 76, etc.* v. *Wisconsin Emp. Rel. Com., supra.* However, the touchstone to finding a basis for preemption in this type of controversy must be Congressional intent to preempt. *Amalgamated Transit Union, etc.* v. *Byrne*, 568 F.2d 1025 (3d Cir. 1977) (*en banc*).

Here, Congress has specifically adopted the bi-state legislation. In approving the Act, Congress has already authorized the impairment of collective bargaining rights as provided by federal labor law. Inasmuch as the Commission was granted total control over the expansion or reduction of the work force, the Commission's authority already "infringes" upon collective bargaining functions normally reserved only to employers and unions. Thus, Congress has already created an exception and specifically sanctioned the Commission's exercise of authority in an area traditionally reserved to plaintiffs' exclusive control. As *De Veau, supra,* sets forth, Congress specifically anticipated the need for future enactments and other action necessary to the carrying out and effectuation of the com-

pact. In vesting the Commission with sole power to control the size and character of the labor force, Congress specifically sanctioned the Waterfront Act, with full knowledge and intention that its specific provisions would override the general policies of federal labor rights if the two came in conflict. In contemplating the Commission's need to enact, *in futuro*, further edicts to continue to effectuate the policies of the compact, Congress approved those additional interferences with federal labor law which might arise as a natural consequence thereof.

It is by no means clear that Determination 15 creates any further impairment of plaintiffs' collective bargaining rights than did the compact as originally approved. Determination 15 does not interfere with plaintiffs' rights to ". . . bargain collectively and agree upon any method for the selection of such employees by way of seniority, experience, regular gangs or otherwise . . . ." because it does not attempt to dictate to the employers or unions the manner in which employees are to be selected for employment. Since the transfer is voluntary, a longshoreman who wishes to become a checker does so with a knowing and intentional waiver of his prior seniority status, and subjects himself to whatever new terms and conditions are negotiated on his behalf. Plaintiffs are still free to determine the seniority, order of hiring, etc. of the new checkers once they enter the register. All Determination 15 does is dictate the manner in which the checker and longshoremen registers are to be filled and regulated. There can be no question but that this is within the sole authority and discretion of the Commission. Once the registers have been filled, plaintiffs are not the least bit impaired from collectively bargaining on the issues of seniority, hiring priority, etc.

In promulgating Determination 15, the Commission has determined, that in the best interests of New York Harbor, 200 more employees are needed in the checker force. It is

the opinion of the Commission, whose factual determinations this court is not able to disturb, that a transfer is the most practical and economical method of alleviating the checker shortage. Determination 15 accomplishes three major purposes: (1) it increases the checker register, thereby eliminating the shortage; (2) it decreases the size of the longshoremen's register, thereby reducing the excess of longshoremen, and (3) it creates new categories and priorities for the registration of checkers, which, according to its own factual determinations, will result in an enormous increase of efficiency and economic savings to the entire Harbor industry.

IV

In light of the foregoing, it should be apparent that Determination 15 does not represent an *ultra vires* exercise of the Commission's power, but rather is consistent with and in furtherance of the underlying purposes and policies of the compact. It is doubtful that Determination 15 infringes plaintiffs' collective bargaining rights to a degree greater than did the compact as originally written and approved by Congress. If it does so, then that impairment was specifically anticipated by Congress and has its approbation, for in approving the compact Congress also put its imprimatur on future legislation in furtherance of the original policies and purposes of the compact. Since Determination 15 implements the primary goal of the compact, any infringement it makes upon federally guaranteed collective bargaining rights represents a congressionally approved exercise of power by the Commission.

For the foregoing reasons, plaintiffs' request for a preliminary injunction is denied. Plaintiffs' cross-motion for summary judgment will also be denied and an order granting summary judgment will be entered in favor of defendant.

DATED: June 1, 1978.